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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970.

No. [redacted] 256.

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees,

and,

PAUL V. DURKIN, *et al.*,

Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT AND APPENDIX ON BEHALF OF APPELLANT FIRST MERCANTILE CONSUMER DISCOUNT COMPANY

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GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Appellant First Mercantile Consumer Discount Company ("First Mercantile") appeals from so much of the

final judgment of the Supreme Court of New Jersey, entered on March 17, 1970 and reported at 55 N. J. 489, 262 A. 2d 874, as affirms the judgment of the Superior Court of New Jersey, Appellate Division, entered on September 11, 1968 and reported at 102 N. J. Super. 549, 246 A. 2d 460. First Mercantile does not appeal from that part of said judgment of the Supreme Court of New Jersey which modifies the supplemental determination of the Appellate Division, entered on February 24, 1969 and reported at 104 N. J. Super. 512, 250 A. 2d 593.* Specifically, this appeal is taken from the New Jersey Supreme Court's adjudication of the merits of this controversy, and not from that court's ruling on the extent to which its judgment will be retroactively applied. See *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 364 (1932).

This Jurisdictional Statement is submitted, pursuant to *United States Supreme Court Rule* 15, to demonstrate that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The majority opinion of the Supreme Court of New Jersey and the dissenting opinion of Chief Justice Weintraub (in which two other Justices joined) are set forth at Appendix B, *infra*. The initial opinion of the Superior Court of New Jersey, Appellate Division, is set forth at Appendix C, *infra*, and that court's supplemental opinion is set forth at Appendix D, *infra*. The opinion of the Superior Court of New Jersey, Law Division, which was rendered on November 3, 1967 and which is not reported, is set forth at Appendix E, *infra*.

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* Appellant's Notice of Appeal is set forth at Appendix A, attached hereto.

Jurisdiction

Here is what the New Jersey Supreme Court held, by a vote of 4-3: where a Pennsylvania corporation, licensed and regulated by the Pennsylvania Department of Banking under the Pennsylvania Consumer Discount Company Act, 7 *Purdon's Penn. Stat. Ann.* §§6201, *et seq.*, lends money in Pennsylvania, in full compliance with that act, to a New Jersey borrower who has travelled to Pennsylvania to obtain the loan; and where the terms of the loan require that it be repaid in Pennsylvania; and where the only contacts with New Jersey are (a) the borrower resides there and (b) the security is a second mortgage on New Jersey real property; then, the loan is entirely unenforceable in New Jersey's courts—neither principal nor interest may be recovered—unless the lender has been licensed under the New Jersey Secondary Mortgage Loan Act of 1965, N.J.S.A. 17:11A-1, *et seq.*, and the loan fully complies with that act. 55 N. J. at 491, 262 A. 2d at 875, affirming 102 N. J. Super. 549, 246 A. 2d 460.*

The rationale was that the New Jersey Legislature, by "implied legislative fiat" implanted in the Secondary Mortgage Loan Act, extended the ambit of that act to cover loan transactions entered into in other states. 102 N. J. Super. at 562-66, 246 A. 2d at 467-69. This, despite the Appellate Division's admission that "Supervision of [Pennsylvania] licensees [by Pennsylvania authorities] is comprehensive and comparable to that provided for by the New Jersey act." 102 N. J. Super. at 559, 246 A. 2d at 465. As Chief Justice Weintraub wrote in his dissent: "the majority opinion must ultimately amount to this extraordinary proposition, that any loan to a New Jersey resident made anywhere is wholly void if it would

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* The New Jersey statute is set forth at Appendix F, *infra*, and the Pennsylvania statute is set forth at Appendix G, *infra*.

violate our usury statutes if made here, even though the loan was authorized by the law of the place where it was negotiated, made and payable." 55 N. J. at 498, 262 A. 2d at 879.*

Appellant is a Pennsylvania corporation licensed under Pennsylvania's Consumer Discount Company Act. Its place of business is 2009 Chestnut Street, Philadelphia. Millions of dollars in loans it extended to New Jersey residents at its place of business are now subject to forfeiture by reason of the determination below. The existence of its business, the jobs of its employees, are in jeopardy. Other Pennsylvania licensees are similarly situated.

The construction of the New Jersey Secondary Mortgage Loan Act by the Supreme Court of New Jersey, even if erroneous, *cf.* Weintraub, C.J., dissenting at 55 N. J. 498-99, 262 A. 2d 879-80, is binding upon this Court. See, *e.g., Kingsley Corp.* v. *Regents of U. of N. Y.*, 360 U. S. 684, 688 (1959); *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 513 (1933). The legislation, glossed with this construction, was challenged by appellant in the courts below as repugnant to the *United States Constitution*, Article 1, Section 8, Clause 3 (Commerce Clause), Article 4, Section 1 (Full Faith and Credit Clause), and Amendment 14 (Due Process Clause). This challenge was rejected and the act, as construed, was upheld. 55 N. J. 489; 262 A. 2d 874 (decided March 17, 1970). Appellant filed its notice of appeal with the Clerk of the Supreme Court of New Jersey on April 3, 1970, pursuant to *United States Supreme Court Rule* 10(3).

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* The reason is that the security is not central to the transaction. 55 N. J. at 496-98, 262 A. 2d at 878-79; see *Restatement Second, Conflict of Laws*, §195, *Comment b*; *Manhattan Life Ins. Co.* v. *Johnson*, 188 N. Y. 108, 80 N. E. 658 (1907).

It is respectfully submitted that this Court has jurisdiction to review the judgment below by appeal pursuant to 28 *U.S.C.* §1257(2). See, *e.g.*, *Hess* v. *Illinois*, 386 U. S. 753, 754 (1967); *American Oil Co.* v. *Neill*, 380 U. S. 451, 455 (1965).

Questions Presented

1. Is the New Jersey Secondary Mortgage Loan Act, *N.J.S.A.* 17:11A-1, *et seq.*, as construed by the New Jersey Supreme Court, repugnant to the *United States Constitution*, Article I, Section 8, Clause 3 (the Commerce Clause), where said act regulates interstate loan transactions, rendering non-conforming interstate loans wholly unenforceable in the courts of New Jersey?

2. Is said act, as construed, repugnant to the Commerce Clause of the *United States Constitution* where it is construed to be applicable to a loan by a Pennsylvania lender to a New Jersey borrower who has travelled to Pennsylvania to obtain the loan, who returns to New Jersey with the proceeds of the loan and who is required to repay the loan in Pennsylvania, merely because a second mortgage on New Jersey land, discharged in the course of litigation, is taken as security for the loan?

3. Is said act, as construed, repugnant to the Commerce Clause of the *United States Constitution* where "the fine hand of [New Jersey] lenders" may be seen in its draftsmanship, where it is designed to exclude out-of-state lenders from the New Jersey market and where it succeeds in its design by requiring out-of-state lenders to maintain a New Jersey office, thus destroying any interstate loan business with New Jersey borrowers?

4. Is said act repugnant to the Due Process Clause of the Fourteenth Amendment to the *United States Constitution* where it is construed to apply extraterritorially?

5. Is said act, as construed, repugnant to the Due Process Clause of the *United States Constitution*, where it arbitrarily subjects Pennsylvania loans to New Jersey regulation, thus precluding such loans entirely because of conflicts in detail between said New Jersey act and applicable Pennsylvania law?

6. Is said act, as construed, repugnant to Article 4, Section 1, of the *United States Constitution*, where it refuses to give full faith and credit to the Pennsylvania Consumer Discount Company Act, 7 *Purdon's Penn. Stat. Ann.* §§6201, *et seq.*, and forfeits Pennsylvania loans notwithstanding that such loans fully comply with the Pennsylvania statute and that the lenders of such loans are licensed thereunder?

Statement of the Case

This action was commenced in the Superior Court of New Jersey, Law Division, to recover on a defaulted promissory note. The lender, Oxford Consumer Discount Company of North Philadelphia ("Oxford"), was and is a Pennsylvania corporation, doing business in Pennsylvania, and licensed under Pennsylvania's Consumer Discount Company Act. The loan, which was made and was repayable in Pennsylvania, fully complied with that statute.

The borrowers, Anthony and Theresa Stefanelli ("Stefanelli"), were New Jersey residents and, by way of security, gave the lender a second mortgage on New Jersey property. The suit did not involve the mortgage, which was discharged of record during the litigation. The borrowers did not deny the debt; their defenses were fraud and illegality. Issue was joined as to the applicability of New Jersey's Secondary Mortgage Loan Act to an admittedly Pennsylvania transaction.

The trial court held for Oxford on cross motions for summary judgment. (See Appendix E.) The rationale was that Pennsylvania law controlled Pennsylvania transactions. Stefanelli appealed to the Appellate Division of the Superior Court. New Jersey's Attorney General intervened, the constitutionality of the statute having been questioned by Oxford.

The Appellate Division reversed, holding the loan entirely unenforceable under Section 29 of the New Jersey Secondary Mortgage Loan Act. (See Appendix C.) The court avoided difficult choice of law questions by discovering an "implied legislative fiat" in the statute, an implication that the act was to apply extraterritorially. 102 N. J. Super. at 565, 246 A. 2d at 469. It swept constitutional problems aside, largely relying on unproven allegations of "victimization" of New Jersey borrowers by Pennsylvania lenders. *Id.* at 569, 246 A. 2d at 471. For example, to escape the impact of the Full Faith and Credit Clause, the Appellate Division held that the Pennsylvania Consumer Discount Company Act would "offend New Jersey policy in a most sensitive area," *id.* at 575, 246 A. 2d at 474, whereas, earlier in its opinion, it came to this conclusion regarding the Pennsylvania statute: "Supervision of [Pennsylvania] licensees is comprehensive and comparable to that provided for by the New Jersey act." *Id.* at 559, 246 A. 2d at 465.

Since the case came up on summary judgment, the Appellate Division recognized it could not resolve factual disputes.* Rather than remand, however, it developed a

* Nevertheless, the Court took the questionable approach of reciting disputed facts as "enlightening background." *Id.* at 557-558, 246 A. 2d at 464.

radical theory for disposition of the appeal in favor of the borrowers. It ruled that New Jersey residence and a second mortgage on New Jersey property (both undisputed facts) sufficed to bring the Pennsylvania loan—not just the question of the validity of the security—within the ambit of New Jersey's Secondary Mortgage Loan Act.

Thus, although the loan was negotiated in Pennsylvania; all loan documents, including the note, were executed in Pennsylvania; the loan proceeds were disbursed in Pennsylvania; the loan was required to be repaid in Pennsylvania; the lender was a Pennsylvania licensee which had fully complied with Pennsylvania's consumer protection laws; and, in short, although all substantial contacts were in Pennsylvania; the Appellate Division held that New Jersey law controlled and that the Pennsylvania loan was forfeited.

The Appellate Division's ruling was handed down September 11, 1968. By supplemental decision (Appendix D), entered February 24, 1969, First Mercantile Consumer Discount Company ("First Mercantile"), appellant herein, was permitted to intervene.* Intervention was allowed, "although such action on appeal is quite rare and granted only in extraordinary circumstances," 104 N. J. Super. at 516, 250 A. 2d at 595, because of the massive, adverse impact of the Appellate Division's prior ruling on First Mercantile's position in a pending chancery litigation.**

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* The supplemental decision also granted partial, conditional relief from the retroactive effect of the prior judgment. 104 N. J. Super. at 524-25, 250 A. 2d at 600. The relief was modified in the New Jersey Supreme Court's majority opinion. 55 N. J. at 491-94, 262 A. 2d at 875-77.

** Paul and Ellen Durkin, appellees herein, are plaintiffs in the chancery litigation.

The impact was summarized by the Appellate Division:

> "First Mercantile and another Pennsylvania loan company had been sued by certain of their New Jersey borrowers, prosecuting a class action in the Chancery Division, for an injunction to restrain enforcement of all secondary mortgage loans made on the security of New Jersey realty by such corporations, although the loan agreements of plaintiffs in those actions were all executed and provided to be repaid in Pennsylvania. . . .
>
> "First Mercantile filed proofs on its petition for intervention in the present case, showing it had made secondary mortgage loans secured by New Jersey realty amounting to approximately $5.5 million, all of which would be uncollectible if our decision of September 11, 1968 were applied retrospectively; that such a result would be catastrophic, causing insolvency of First Mercantile's parent corporation, throwing 50 of its employees out of work, and jeopardizing loans of about $8 million to these corporations made by various banks, insurance companies and other lenders. . . .
>
> "Upon inquiry by the court, *amicus curiae* Middle Atlantic Finance Association advises that nine of its Pennsylvania members had made out-of-state secondary mortgage loans secured by New Jersey real estate, prior to September 11, 1968, aggregating $4,460,881.96 (not inclusive of loans by First Mercantile but including loans by plaintiff). An undeterminable additional amount of such loans has been made by other Pennsylvania members of that organiaztion." 104 N. J. Super. at 516-17, 250 A. 2d at 596.

Both First Mercantile and Oxford appealed to the New Jersey Supreme Court which, by a 4-3 decision handed down March 17, 1970, "affirmed [on the merits] substantially for the reasons expressed below. . . ." 55 N. J. at 491, 262 A. 2d at 875.* The majority view is persuasively refuted in Chief Justice Weintraub's dissenting opinion, to which Justices Hall and Haneman adhered. The dissent concluded:

> "It should be remembered that other States can do what we do. Our statute does not forbid loans to residents of Pennsylvania, and a New Jersey lender would violate our statute if it made a loan here on the terms of the Pennsylvania statute. The courts of Pennsylvania could give our lender the same treatment we here accord its domiciliary. I think this is shortsighted and at war with the considerations of comity which attend a choice of law. One can foresee still a further complication. If a Pennsylvania lender obtains judgment against a New Jersey borrower by service under a Pennsylvania long-arm statute, what then? We need not invite this discord to vindicate our State policy." 55 N. J. at 500, 262 A. 2d at 880.

The Questions are Substantial

This case began as a simple suit on a promissory note. It escalated into a multi-party litigation involving complex, novel constitutional issues. Its resolution by the courts of New Jersey, over the vigorous objection of Chief

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* All the constitutional questions presented in this Jurisdictional Statement were raised by First Mercantile in its brief in the New Jersey Supreme Court. Substantially the same questions were raised by Oxford in its Appellate Division brief. Oxford is separately appealing to this Court.

Justice Weintraub and Associate Justices Hall and Haneman, subjects millions of dollars in loans to forfeiture, businesses to insolvency, employees to unemployment, and borrowers to loan sharks.*

But there are far more fundamental reasons for noting probable jurisdiction here. Indeed, this appeal presents a classic case of confrontation between states, not just between private litigants. It presents this basic issue: where two states have comprehensively regulated consumer loans to protect borrowers, can one of those states, consistent with the Constitution, refuse to enforce loans lawfully made in the other state?

The grand design of the *United States Constitution* is to avoid such reciprocal interstate hostility. See *Federalist Papers*, Nos. 7 and 42. This case requires reversal because it reverses that design, promoting commercial conflict, encouraging states to disregard the statutes and legitimate interests of other states, enabling the residents of one state to escape obligations voluntarily assumed in another. As Chief Justice Weintraub put it: "We need not invite this discord to vindicate our State policy." 55 N. J. at 500, 262 A. 2d at 880.

We ask that this Court reiterate the fundamental concept that "in the matter of interstate commerce we are a single nation—one and the same people." *Pennsylvania v. West Virginia*, 262 U. S. 553, 596 (1923). We ask that this Court compel New Jersey to enforce rights lawfully obtained by Pennsylvania lenders under Pennsylvania law "not only as a matter of justice, but as a logical corollary

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* That the effect of eliminating licensed and regulated lenders is to subject borrowers to loan sharks is amply demonstrated in Felsenfeld, *Consumer Interest Rates*, 23 *Business Lawyer*, 931, 936 (1968); Curran, *Trends in Consumer Credit Legislation*, 2 (1965); Gallert, Hilborn & May, *Small Loan Legislation*, 11-14 (1932).

of the national unity of the several states. . . ." Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 *Yale L. J.*, 656, 657 (1918); see Goodrich, *Foreign Facts and Local Fancies*, 25 *Va. L. Rev.* 26, 34-35 (1938); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 *Colum. L. Rev.*, 1, 17 (1945).

1. Commerce Clause.

The guiding principles under the Commerce Clause are settled. A state may not regulate conduct which is inseparably related to commerce between states. See, *e.g.*, *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 110-11 (1910); *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 493-94 (1887). A state can, however, regulate intrastate activities which are related to interstate commerce as long as the regulation does not unduly burden or discriminate against interstate commerce. See, *e.g.*, *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U. S. 276, 278 (1961); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209-10 (1944).

It is respectfully submitted that the decision below erred in holding that the New Jersey act, as construed, was not repugnant to the Commerce Clause, Article 1, Section 8, Clause 3, of the *United States Constitution*. It is further submitted that there are at least four reasons why the questions presented in the Commerce Clause area are so substantial as to require this Court to note probable jurisdiction of this case.

The first reason is that the decision below carved minor New Jersey elements out of an interstate transaction, labelling them local activities subject to New Jersey regulation. This Court has indicated that this process, this result, are unconstitutional. See *e.g.*, *Nippert* v. *Richmond*, 327 U. S. 416, 423 (1946). A brief review of the subject loan transaction and its New Jersey elements is

necessary to expose the error of the approach taken by the Courts below.

The loan was negotiated, executed, accepted, consummated and made payable in Pennsylvania. It involved New Jersey borrowers who travelled to Pennsylvania where they dealt with a Pennsylvania lender. They brought the loan proceeds to New Jersey and, thereafter, sent repayments on the loan to the Pennsylvania lender. The decision below alluded to the following New Jersey elements of the transaction: the borrowers' residence, the place where the mortgage was recorded and the security was located, the source of the loan repayments, and the lender's alleged operation in the New Jersey market through an intermediary.

It suffices to say that, properly viewed, the loan transaction is clearly either interstate business or Pennsylvania business. It does not involve intrastate New Jersey activities. All of the New Jersey elements are inseparably related to the interstate character of the business. Nor do they justify New Jersey regulation thereof. They simply point to the obvious fact that one of the states in this interstate transaction is New Jersey.

It should be emphasized that the second mortgage involved no intrastate New Jersey activity as it was indisputably integrated in the flow of the interstate transaction, having been sent to New Jersey for recordation and returned to the Pennsylvania lender. It followed the same course when discharged. It was a nonessential part of the transaction, legally and economically.** Further-

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* 55 N. J. at 496-98, 262 A. 2d at 878-79; see *Restatement Second, Conflict of Laws*, §195, Comment b; *Manhattan Life Insurance Co.* v. *Johnson*, 188 N. Y. 108, 80 N. E. 658 (1907).

** 55 N. J. at 497, 262 A. 2d at 879; under the Pennsylvania act a mortgage need not be taken as security. 7 *P. P. S. A.* §6213(B).

more, the lenders do not dispute that New Jersey can regulate the mortgage. But the mortgage was never in issue; the suit was on the note and the mortgage was discharged. It is the loan which is in question here. It is the loan which is regulated to the extent of forfeiture.

As to the alleged solicitation of loan business in New Jersey by Pennsylvania lenders, it must first be noted that such solicitation was disputed; that the decision below improperly relied on it in granting summary judgment. 102 N. J. Super. at 569, 246 A. 2d at 471. More importantly, even if, *arguendo*, such solicitation existed, it would be only another element of the interstate transaction at bar, another element which cannot be considered intrastate New Jersey activity subject to New Jersey regulation. In *Eli Lilly & Co.* v. *Sav-On-Drugs*, *supra*, 366 U. S. at 278-79, this Court stated: "Under the authority of the so-called 'drummer' cases, such as *Robbins* v. *Shelby County Taxing Dist.*, Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." This Court has long adhered to this principle.

The second reason why the ruling below calls for review in the Commerce Clause area is that the New Jersey decision improperly assessed the respective strengths of the New Jersey and national interests involved and failed to achieve a proper accommodation between these competing interests. See *United States* v. *South-Eastern Underwriters Asso.*, 322 U. S. 533, 548 (1944). Only this Court can now reach the proper accommodation between these interests.

The New Jersey decision, out of provincialism, exaggerates the significance of the New Jersey elements of the loan transaction at bar. It is submitted that they do not justify the burden on interstate commerce which results

from the application of the New Jersey act to the subject loan, a burden which goes to the extent of complete destruction. The primary instrument of this destruction is Section 29 which denies enforcement of the loan unless there has been full compliance with the terms of the act. *N.J.S.A.* 17:11A-29. The burden is undue because the New Jersey and the Pennsylvania acts regulate commerce in a "comparable" way, as the opinion below admitted. 102 N. J. Super. at 559, 246 A. 2d at 465.

Another undue burden is the regulation of Pennsylvania lenders' profit which is so severe that they doubtless will be forced out of the interstate loan business. Under Section 22 of the New Jersey act the lender can make certain charges which are prohibited under the Pennsylvania statute. If he does, he violates the Pennsylvania act. 7 *P.P.S.A.* §6213(F) and (M); §6214(B). However, if he does not charge for these items, but does charge the 18% rate of interest allowable under the Pennsylvania statute, 7 *P.P.S.A.* §6213(E), the loan would then violate Section 21 of the New Jersey statute. The rub is that if the lender only charges the New Jersey rate of 14%, he will be put out of business.

There are additional undue burdens on interstate commerce: Section 2 of the New Jersey act licenses interstate commerce in contravention of the decisions of this Court, see *Eli Lilly & Co.* v. *Sav-On-Drugs, supra,* 366 U. S. at 278; *International Textbook Co.* v. *Pigg, supra,* 217 U. S. at 110-111, and Section 17 requires the Pennsylvania lender to maintain a branch office in New Jersey. 102 N. J. Super. at 572, 246 A. 2d at 472. Of course, the latter provision is not merely a burden on interstate commerce; it completely eliminates it.

The third reason why this Court should note probable jurisdiction of this case is that the New Jersey act, as

construed, discriminates against interstate commerce. The point is that there is no justification for denying access to the New Jersey borrower market to out-of-state lenders where such lenders are subject to comparable legislation. The most blatant illustration of the discriminatory thrust of the New Jersey act is the requirement of Section 3 that 50% of the stockholders of a corporate licensee be New Jersey residents for at least two years before the application is filed. Although this provision was invalidated and severed from the statute by the decision below, 102 N. J. Super. at 560-62, 246 A. 2d at 466-67, it clearly reveals the Legislature's improper motive in adopting the act. The decision below recognized the inherent evil in the provision:

> "It seems to us highly likely that section 3 had no motivation other than to favor New Jersey residents engaged in the consumer lending field as against out-of-staters." 102 N. J. Super. at 561, 246 A. 2d at 466.

The Legislature's motive was the same when it passed the other provisions of the act; its motive cannot be severed.

In this connection it should also be noted that one of the major forces behind the New Jersey act was the report of the New Jersey Real Estate Commission, a commission composed entirely of New Jersey real estate brokers. *N.J.S.A.* 45:15-15. The decision below improperly relied heavily on this report although it was extra-record evidence.

The fourth reason is that the decision below failed to give proper effect to the precedents of this Court and incorrectly relied on factually distinguishable licensing cases to sustain the forfeiture of millions of dollars of interstate loans. This is apparent from the discussion

above and need not be developed at this time. It might be observed that the reliance of the decision below on *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist Ct. App. 1964), *appeal dismissed sub nom. Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1 (1965), is misplaced. As Chief Justice Weintraub pointed out in his dissent, the *Fairfax* case is plainly distinguishable. 55 N. J. at 495, n. 1, 262 A. 2d at 878, n. 1.

The New Jersey Secondary Mortgage Loan Act, as construed by the courts below, clearly violates the Commerce Clause of the *United States Constitution*.

2. Due Process.

There are two branches to this issue:

First, there is New Jersey's bald assertion of power to regulate Pennsylvania transactions through the device of refusing to enforce licensed and lawful Pennsylvania loans. We submit this violates due process, as this Court indicated in *Alaska Packers Ass'n* v. *Industrial Accident Comm.*, 294 U. S. 532, 540-41 (1935):

> "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. . . . Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state. . . ."

Alaska Packer's has not been overruled. Nor should it be. One reason is that states are sovereign within their boundaries and not beyond. See, *e.g.*, *New York, L.E. & W.R. Co.* v. *Commonwealth of Pennsylvania*, 153 U. S. 628, 646 (1894); *New York L. Ins. Co.* v. *Head*, 234 U. S. 149,

161 (1914); *cf. F.P.C.* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 20 (1961). And there is the ancient, *United States Declaration of Independence*, modern, *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964), and fundamental philosophy that government derives its power from the consent of the governed. As this Court said: ". . . [T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767 at n. 2 (1945).

Second, there is the fundamental unfairness of subjecting a business to dual, conflicting regulations; the unreasonableness of superimposing New Jersey regulatory details on Pennsylvania transactions which are already regulated by the Commonwealth of Pennsylvania. The impact is not simply the necessity of filing forms in two states, paying fees to two treasuries, reporting to and being checked by two banking and insurance departments. Nor is it merely the expense and inconvenience of opening and maintaining a "branch office" in New Jersey, which according to the Appellate Division, does not involve "invidious discrimination," 102 N. J. Super. at 572, 246 A. 2d at 472.

The impact is far more severe; the unreasonableness is more arbitrary. The result is to prevent those Pennsylvania lenders who survive the forfeiture of their outstanding New Jersey loans from doing business with New Jersey borrowers at all. The reason is that only by restricting their interest to New Jersey's 14% can they comply, whereas only by charging substantial expenses to the borrowers, as permitted by New Jersey's act, *N.J.S.A.* 17:11A-22, but prohibited by Pennsylvania's, 7 *P.P.S.A.* §§6213-14, can they continue in business.

Is this a reasonable exercise of the police power? Is it reasonable to impose dual regulation? Is it reasonable

to line the pockets of local lenders by making it difficult if not impossible for out-of-state lenders to transact loans with New Jersey borrowers? Does it do New Jersey borrowers any good to remove licensed, regulated Pennsylvania lenders from the market?

There is a clear denial of due process here.

3. Full Faith and Credit.

The *United States Constitution*, Article 4, Section 1, provides in pertinent part: "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State." The clause has been implemented. 28 *U.S.C.* §1738. It is settled that "public Acts" include state statutes. See, *e.g.*, *Broderick* v. *Rosner*, 294 U. S. 629, 644 (1935).

The loans in question here were contractual rights authorized by and arising under Pennsylvania's Consumer Discount Company Act. 7 *P.P.S.A.* §6213. Such rights must be enforced in the courts of sister states, *e.g.*, *Hughes* v. *Fetter*, 341 U. S. 609, 612 (1951), unless to do so would be "obnoxious to the public policy of the forum. . . ." *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160 (1932).

The exception is what the courts below relied upon. New Jersey's Appellate Division held that Pennsylvania's Consumer Discount Company Act would "offend New Jersey policy in a most sensitive area. . . ." 102 N. J. Super. at 575, 246 A. 2d at 475. New Jersey's Supreme Court affirmed. 55 N. J. at 491, 262 A. 2d at 875.

This reliance on the public policy exception to full faith and credit is an example of provincialism at its most extreme. See generally Goodrich, *op. cit.*, 25 *Va. L. Rev.* 26; Beach, *op. cit.*, 27 *Yale L. J.* 656. "The existence of statutes on the same subject [borrower protection] point-

ed towards harmony of policy; not repugnance." Note, 39 *Colum. L. Rev.* 860, 863 (1939). "Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy." *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 111, 120 N. E. 198 (1918) (per Cardozo, J.).

Here, the statutes of New Jersey and Pennsylvania are obviously similar; only details differ. The statutes are similar in public policy: both seek to protect borrowers "against extortionate interest charges," *Equitable Credit & Discount Co.* v. *Geier*, 342 Pa. 445, 21 A. 2d 53, 57 (1941), and "exorbitant financial practices.", 102 N. J. Super. at 555, 246 A. 2d at 463. The statutes are similar in the cost to the borrower of licensed loans. *Compare N.J.S.A.* 17:11A-21 and 22 with 7 *P.P.S.A.* §6213; see Weintraub, C. J., dissenting, 55 N. J. at 499, 262 A. 2d at 880.

While it may be argued that Pennsylvania enforcement procedures are superior to those of New Jersey, *compare* 7 *P.P.S.A.* §6211, *with N.J.S.A.* 17:11A-14, New Jersey's Appellate Division conceded at least that, under the Pennsylvania act: "Supervision of licensees is comprehensive and comparable to that provided for by the New Jersey act." 102 N. J. Super. at 559, 246 A. 2d at 465. And in some respects, *e.g.*, coverage limitations, it is perfectly clear that "the Pennsylvania statute is more protective [of the borrower]. . . ." Weintraub, C. J., dissenting, 55 N. J. at 496, 262 A. 2d at 878.

In short, Pennsylvania lenders are as well regulated as New Jersey lenders; and New Jersey borrowers are similarly protected in both states. The "mere fact" that the statutes do not exactly conform does not make one "obnoxious" to the public policy of the other. *Bradford Electric Co., Inc.* v. *Clapper, supra*, 286 U. S. at 161-62.

The public policy exception is, therefore, totally inapposite. New Jersey should be required to extend full faith and credit to Pennsylvania's Consumer Discount Company Act.

CONCLUSION

We urge that the questions presented by this appeal are so substantial as to require plenary consideration by this Court; that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Notice of Appeal to the Supreme Court of the United States

(Filed April 3, 1970.)

Notice is hereby given that First Mercantile Consumer Discount Company, the intervenor appellant above-named, hereby appeals to the Supreme Court of the United States from so much of the final judgment of the Supreme Court of the State of New Jersey, entered in this action on March 17, 1970, as affirms the judgment of the Superior Court of New Jersey, Appellate Division, set forth at 102 N. J. Super. 549, 246 A. 2d 460 (1968). Said appellant does not appeal from so much of the New Jersey Supreme Court's judgment as modifies the Appellate Division's determination, set forth at 104 N. J. Super. 512, 250 A. 2d 593 (1969), as to the retroactive reach of its prior judgment. Specifically, this appeal is taken from the final judgment of the Supreme Court of New Jersey on the merits of this controversy and not from that Court's ruling on the extent to which its judgment will be retroactively applied.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

CLAPP & EISENBERG
Attorneys for Intervenor-Appellant
By: ARNOLD K. MYTELKA
Counsel for Appellant

APPENDIX B

Opinion of Supreme Court of New Jersey

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli, et al.*

(filed March 17, 1970)

PER CURIAM.

Subject to a qualification to be stated, the judgment of the Appellate Division is affirmed substantially for the reasons expressed below in the exhaustive opinions of Judge Conford. *Oxford Consumer Dis. Co. of No. Phila.* v. *Stefanelli*, 102 N. J. Super. 549 (App. Div. 1968), and 104 N. J. Super. 512 (App. Div. 1969).

The first opinion of the Appellate Division was handed down on September 11, 1968. Prior to that date certain New Jersey borrowers other than the defendants Stefanellis had brought suit against First Mercantile Discount Company and another Pennsylvania loan company in the Superior Court, Chancery Division, seeking an injunction to prevent the enforcement of all secondary mortgage loans made by such corporations on the security of New Jersey realty. Basically the same issues were involved in that action (which the plaintiffs were allegedly prosecuting as a class action) as in the *Oxford* case. Subsequent to September 11, 1968 some of these parties applied to the Appellate Division for leave to intervene and for a rehearing in order to be heard on the issues decided in *Oxford*. The leave was granted and the common problems in the cases were reargued. One of the primary questions presented for further consideration was whether, if the Appellate Division adhered to the view expressed in the September 11, 1968 opinion respecting the applicability of the New Jersey Secondary

Mortgage Loan Act, the judgment should be prospective or retrospective in scope. The position of the loan companies was that in no event should loan transactions made by Pennsylvania corporations licensed in Pennsylvania to make such loans and entered into before the effective date of that decision be adversely affected by it, where the loans were not only made in Pennsylvania but were repayable there and in all other respects were in conformity with Pennsylvania law. (See 104 N. J. Super. at 516).

Thereafter the Appellate Division affirmed its original holding and dealt comprehensively with the prospectivity—retroactivity issue. 104 N. J. Super. at 519-25. It held that sufficient equitable considerations were present to warrant denial of unrestricted retroactive operation of the September 11, 1968 decision. In specifying the restrictions it said:

> 1. "We have concluded that we should not now go beyond adjudicating relief from retroactivity in respect of transactions where there was no intermediation of any kind by others, operating in this State, between Pennsylvania lender and New Jersey borrower."
>
> 2. "We are clear, first, that Pennsylvania lenders obtaining New Jersey loan business on a regular continuing basis by or through agents, brokers, or representatives operating in this State, whether or not technically independent contractors, could not reasonably have been advised in advance that choice of law and interstate commerce factors would immunize the loans from the effect of the New Jersey act. As to such loans, therefore, the decision of September 11, 1968 will remain fully re-

troactive. As to any other type of case involving some degree of casual intermediation between the lender and the borrower by operative functioning in this State, the court should appraise the particular facts of the individual case for determination as to whether considerations of fairness and justice call for relief from retroactivity of the September 11, 1968 decision in such instance, according to the criteria discussed above."

3. "It is next necessary to decide whether there should be any curtailment of the lender's claim to interest and other charges where it ultimately qualifies otherwise for relief from retroactivity. As heretofore noted, plaintiff and intervenors contend that fairness would be served by requiring the borrowers to pay the interest rates and other charges (if specifically agreed to in the loan contract) allowed for such transactions by either the New Jersey or Pennsylvania statute, whichever is the lower. We think some further curtailment of recoverable interest is appropriate in order to give a degree of substantial effect to the circumstance that, in finality, the lenders have violated New Jersey law as substantively determined by our prior decision. Therefore recovery will be limited to 6% per annum simple interest computed on principal balances outstanding on funds actually advanced." (Numbering of paragraphs ours.) 104 N. J. Super. at 524-25.

We take paragraph 3 to mean that in *all* cases of loans made by plaintiffs as well as intervenors and *amici* loan companies to New Jersey borrowers and secured by secondary mortgages on New Jersey realty as defined in N.J.S.A. 17:11A-1a, which are not within the bar of para-

graph 2 above, the lender may recover the sum of the loan as actually advanced but only with 6% simple interest on principal balances outstanding. In our view the equities referred to in the second Appellate Division opinion on the subject of retroactivity of the September 11, 1968 decision require a less drastic limitation.

Assuming the loan transactions of Anthony E. and Theresa A. Stefanelli, defendants in the principal case, and Paul V. Durkin and Ellen Durkin, Lindley Henry, Jr. and Irene Henry, Paul Kuzmick and Jane Kuzmick, plaintiffs in the injunction action referred to above, had been instituted and in existence prior to September 11, 1968 and are not within paragraphs 1 or 2 quoted above, these parties are entitled to retroactive benefit of the decision of that date to this extent: They shall be liable for the agreed installment payments of the principal of the actual loan to them but without interest. Additionally, if their loan transactions resulted from intermediation within the contemplation of paragraphs 1 or 2, the September 11, 1968 decision shall be fully retroactive, and they shall have no liability on their loans.

If there are other persons not named above who were, prior to September 11, actually in litigation challenging the validity of the type of loans that are involved in this case, they too are entitled to the benefit of the rules of retroactivity just described. Further, the September 11, 1968 decision is fully applicable retroactivity to bar all recovery on New Jersey secondary mortgage loans made prior to that date and which were induced by the lender through intermediation of the nature described by paragraphs 1 and 2 above. All other New Jersey secondary mortgage loans of the type involved in this case made before September 11, 1968 which are not within paragraphs

1 and 2 above, and were not in litigation prior to that date remain unaffected by the judgment in this case.

The record shows that the trial court entered summary judgment against Mr. and Mrs. Stefanelli on their note to Oxford. Thus they had no opportunity to develop the facts respecting the intermediation by an alleged agent of Oxford which induced them to enter into the loan transaction. Under the circumstances, and even though their liability on the note is limited to installment payment without interest on the sum actually advanced to them by plaintiff, they are entitled to an opportunity to submit the facts to the trial court relating to intermediation. If such facts are undisputed and bring their case within paragraphs 1 and 2 above, they are entitled to a judgment exonerating them from liability on their note. If the evidence raises a factual dispute on the subject, the issue must be resolved by a jury or the court if the case is tried without a jury.

The judgment of the Appellate Division is affirmed as modified, and the cause is remanded to the trial court for proceedings consistent herewith.

WEINTRAUB, C. J., dissenting.

This case has an emotional overlay for it involves the distastseful business of lending money at predatory rates to people who are poor or soon will be. I would add, irrelevantly to be sure, a regret that government does not provide loans at tolerable interest charges for those of our citizens who need them most. Instead, the impecunious are made a separate class, alone required to underwrite the high credit risk attributed to some of their num-

ber. But this having been said, the fact remains that this unpleasantness has legislative approval here and elsewhere, and the case must be decided in that light and not some personal one. Indeed, there is little to choose between the New Jersey and Pennsylvania statutes here involved. Labels aside, the sundry charges under the statutes permit about the same size gouge.

And it should be stressed that we are not, on this appeal, dealing with a lender who exacts more than either statute allows or who tolerates the intervention of a "broker" who adds a pillage of his own. I have no doubt that in such circumstances our courts should turn the lender away, and may do so without the aid of a statutory denunciation of the loan as unenforceable. Nor are we dealing with a situation in which the lender actually enters our State to recruit borrowers.[1] The record does not reveal how the sizeable number of New Jersey individuals found their way to Philadelphia. For all we know at the moment, it may have been in response to advertisements published or broadcast in Pennsylvania. What we do know is that the borrower went to Pennsylvania and the loan was made and was payable there, all in harmony with a Pennsylvania statute which also is designed to protect the borrower. Nonetheless, the majority opinion in

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[1] This case is unlike *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist. Ct. App. 1964), appeal dismissed *sub nom. Fairfax Family Fund* v. *California*, 382 U. S. 1, 15 L. ed. 2d 6 (1965), with respect to both the facts and the issue involved. There a Kentucky corporation solicited loans in California by mail and completed the loan transaction by mail after having a credit check made locally in California, and the question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained.

effect holds the New Jersey statute had a presence in Pennsylvania and denounced every such loan to a New Jersey resident, and this notwithstanding that if the loan were made in Pennsylvania on the terms of the New Jersey statute, the loan would have violated the Pennsylvania law.

If our Legislature ordained that every loan made anywhere in the world to a citizen of New Jersey shall be wholly void unless the loan is on terms authorized by New Jersey law, I suspect we would waste little time on that enactment. Yet this, I believe, is precisely the rule the majority opinion innovates and applies. This would be evident at once if the scene were not obscured by the fact that the lender took a "secondary mortgage" on New Jersey property as collateral. But the issue is not whether the mortgage is valid, but whether the loan itself is forfeited because of the existence of our statute, and upon that question the nature of the security cannot reasonably be pivotal.

Indeed, it is hard to grasp the true role of the mortgage under our statute. We can be sure the Legislature was not concerned with the integrity of the real property system of the State, for obviously the mortgage creates no title problem. Rather the Legislature must have had in mind the oppressive capacity of the threat of foreclosure. Yet the statute does not really implement that theme. The amount of the loan does not depend upon the value of the security. The loan may be in any amount whatever, provided only that the lender takes a "secondary mortgage." In this respect the Pennsylvania statute is more protective, for it, like most statutes permitting charges above the basic interest rate, at least fixes a monetary limit upon the loan. 7 P. S. § 6214A. And not only need there be

no relationship under our statute between the value of the security and the amount of the loan, but more than that, the real property need not belong to the borrower or be his home, for the statute requires only "a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families." N.J.S.A. 17: 11A-1a. Nor must the property be in New Jersey, or the borrower a resident of this State.

One need not be unusually perceptive to see the fine hand of lenders in the drafting of this legislation, for, there being no required connection between the value of the security and the loan, the mortgage provision simply enables the lender to loan, at the high charges authorized by this statute, any amount the lender chooses to risk, provided only that the lender does not fail to take a secondary mortgage as a qualifying facade. Indeed, we were told in this case, and also at a public hearing held last year (with respect to whether the holder of a note and mortgage should be required to foreclose a mortgage before suing on the note), that the secondary mortgage (whatever its *in terrorem* effect may be on the borrower) is not, realistically, security for these loans; that the economics are such that a foreclosure is a waste of money and hence is rarely pursued.

In any event, the "secondary mortgage" is not so central to the fairness of the transaction as to distinguish this statute from any other of our usury statutes with respect to the immediate issue, *i.e.*, whether a loan made outside our State to a resident of our State is wholly void because, although obedient to the law of the State where the loan was negotiated, made and payable, the loan is not on terms which a statute of ours would permit if the loan were made here. If the Pennsylvania loan were made without the mortgage security (and under Pennsylvania

law the lender is not required to take that security), the terms of the loan would still clash with those of our statute. These are sundry pressures which one State might permit and another might not, such as a chattel mortgage, or a wage assignment, or a power of attorney to confess judgment. The greatest oppression may be in the interest rate itself, and the threat of judicial enforcement of the promise to pay it. If it is correct to forfeit a foreign loan because a secondary mortgage was taken, it would be equally correct to forfeit every such loan for any other departure from our domestic statutory scheme.

That is why I believe the majority opinion must ultimately amount to this extraordinary proposition, that any loan to a New Jersey resident made anywhere is wholly void if it would violate our usury statutes if made here, even though the loan was authorized by the law of the place where it was negotiated, made and payable.

When we speak of "choice of law," we ought not to be blind to the consequences proposed. It may not be unreasonable to construe an insurance policy in accordance with the law of the place of residence of the assured, or to deny a specific remedy, or to limit the fruit of a transaction. But it should not be assumed that considerations which will lead to such consequences under "choice of law" will also support a forfeiture of what a party to the transaction has paid. It is one thing to refuse some measure of relief. It is dramatically different to denounce the transaction as void and to forfeit what was lawfully loaned under the law of the place of the loan.

As I understand them, the opinions in the Appellate Division and the majority opinion in our Court conclude that the Legislature itself dictated the "choice of law" and mandated the forfeiture of a loan negotiated, made

and payable in another State. I cannot find a trace of any such legislative decision.[2] There is not a single provision in the statute which intimates that New Jersey residents will carry the statute in their pockets wherever they go. The statute speaks only of loans made here. N.J.S.A. 17:11A-2 requires the issuance of a "license," and N.J.S.A. 17:11A-17 requires the licensee to keep books and records, not in Pennsylvania, Arizona, California, or Hawaii, but "at its place or places of business in this State." That the statute was intended to deal only with loan transactions within this State is perfectly evident from N.J.S.A. 17:11A-3, which required (unconstitutionally, as later adjudged) that an applicant for a license "shall have been a bona fide resident of this State for a period of at least 2 years prior to the date of filing the application for such license" and that in the case of a corporate applicant, the holder or holders of at least 50% of the stock "shall have resided in this State for a period of at least 2 years prior to the date of filing the application." In view of those terms, it cannot be said the Legislature itself made a "choice of law" and dictated that whenever a conflict-of-laws problem arises, the courts must apply the provision of N.J.S.A. 17:11A-29 that "No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the pro-

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[2] Compare the provision of N.J.S.A. 17:10-20 of the "Small Loan Law," as amended by L. 1967, c. 94, § 16, which speaks expressly of loans made elsewhere to a resident of our State and which purports to deny enforcement of such loans except when "the amount of interest, discount, consideration or other charges for such loan, demanded to be paid in such action, does not exceed that permitted to a licensee by this chapter for a loan of the same amount payable in the same manner."

visions of this act." Indeed, that view of the statute must condemn it as plainly arbitrary, for the statute would then mean that a secondary mortgage upon the real property described in the statute will void every loan, made upon any terms whatever, unless the loan is made by someone who is licensed under this statute and is present in New Jersey.

The "choice of law" issue is in our hands without any legislative prescription. I think it unreasonable to forfeit a loan upon the factual hypothesis now before us. Rather, the sensible course is to sustain the transactions with whatever modification our local policy may be thought to mandate. Thus, if the interest rate is found to be hostile to a strong legislative policy, it may be reduced. Here, as already noted, the Pennsylvania statute and the New Jersey statute seem to authorize nomenclature to one side, the same total exaction from the borrower. Or if the secondary mortgage as such is thought to be intolerably offensive to our statute, we could order the mortgage cancelled. So, too, we could deny any other remedy the loan agreement may give the lender if that remedy is thus offensive. See *Restatement Second, Conflict of Laws, Part II* (Proposed Official Draft, 1968), §§ 195 and 203. Indeed, such relief, if justified, should not be limited to borrowers who were or are residents of our State, for the same policy considerations must protect as well any borrower the lender pursues in our jurisdiction.

It should be remembered that other States can do what we do. Our statute does not forbid loans to residents of Pennsylvania, and a New Jersey lender would violate our statute if it made a loan here on the terms of the Pennsylvania statute. The courts of Pennsylvania could give our lender the same treatment we here accord its domiciliary. I think this is short-sighted and at war with the

considerations of comity which attend a choice of law. One can foresee still a further complication. If a Pennsylvania lender obtains judgment against a New Jersey borrower by service under a Pennsylvania long-arm statute, what then? We need not invite this discord to vindicate our State policy.

Hence, wholly apart from any constitutional issue, we should not forfeit the loan negotiated, made and payable in another State merely because the borrower was a resident of New Jersey and the terms of the loan, valid where made, do not coincide with what our statute requires or permits. I would reverse the judgment and remand the matter to the trial court for trial of the remaining issues, including the question whether there was an unauthorized brokerage charge to the knowledge of the lender.

Mr. Justice Hall and Mr. Justice Haneman join in this dissenting opinion.

APPENDIX C

Opinion of the Superior Court of New Jersey, Appellate Division

Oxford Consumer Discount Company of North Philadelphia v. Stefanelli, et al. (filed September 11, 1968).

CONFORD, S. J. A. D. This appeal presents important questions relating to the validity and applicability to plaintiff, a Pennsylvania loan company not authorized to do business in New Jersey, of the Secondary Mortgage Loan Act of 1965 (L. 1965, c. 91, N.J.S.A. 17:11A-1 *et seq.*),[1] and regulations of the Commissioner of Banking and Insurance promulgated pursuant thereto, more specifically in respect of its loan to defendants, residents of New Jersey, secured by a second mortgage on their Newark home. The Attorney General has been granted leave to intervene on the side of defendants to defend the validity of the act and regulations; and Middle Atlantic Finance Association to file a brief *amicus curiae*, which has been helpful. It has also participated in the oral argument.

The Superior Court, Law Division, granted summary judgment for $5,071.82 in favor of plaintiff in its action on a note executed June 6, 1966 by defendants at the Philadelphia office of plaintiff and there delivered to it, that transaction being purportedly authorized by the Pennsylvania statute, *Tit.* 7, *Purdon's Pa. Stat.*, §§ 6201-6219 ("Consumer Discount Company Act"). At the same time the court denied defendants' motion for summary judgment. Enforcement of the mortgage taken as security for the loan at the same time the note was delivered was not sought or involved in the action.

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[1] Reference herein to section numbers of the Act will identify corresponding numbers in N.J.S.A. E.g., section 1 is N.J.S.A. 17:11A-1.

Opinion of the Superior Court of New Jersey, Appellate Division

Although the scope of defenses to the action now advanced is not identical with those set forth in the original pleadings, we have concluded that the questions of public policy implicated in the appellate arguments are so significant and the desirability in the public interest of present judicial determination thereof so obvious that we ought to decide all relevant legal questions argued on the appeal insofar as the record permits us to do so. None of the parties has contended for a narrower approach.

Basically, defendants and the Attorney General argue that the Secondary Mortgage Loan Act of 1965 is applicable to this transaction; and that there were several violations of that act in the course of the transaction, thereby calling into play section 29 of the act precluding enforcement in the courts of this State of any obligation arising out of a secondary mortgage loan not negotiated and made in full compliance with the provisions of the act. Defendants also contend there was fraud by plaintiff in that they were not advised and did not know that the papers they signed included a mortgage on their home.

Plaintiff asserts the New Jersey statute does not and constitutionally cannot apply to this transaction; that the loan was valid under the Pennsylvania statute regulating such transactions; that conflict of laws principles call for application of the Pennsylvania rather than the New Jersey statute in resolving the validity and enforceability of the loan, and that denial of enforcement of the cause of action by New Jersey would violate the due process, equal protection, interstate commerce and full faith and credit clauses of the United States Constitution.

Opinion of the Superior Court of New Jersey, Appellate Division

I. Legislative Background

The Secondary Mortgage Loan Act of 1965 emerged as a compromise of proposals embodied in three bills in the 1965 session of the Legislature, *Assembly Nos.* 522 and 732, and *Senate No.* 244. Its adoption was preceded by widespread complaints to the authorities concerning false and fraudulent advertising of the availability of loans and terms thereof and the exaction of exorbitant rates of interest and concomitant other charges from needy borrowers. Typically, the lenders in these transaction required the furnishing by borrowers of mortgages on their homes as security, and generally the financial difficulties of the borrowers were such that the mortgages given were necessarily junior liens to existing mortgages on their properties.

These conditions were fully documented in a report dated January 5, 1965 from the Secretary-Director of the New Jersey Real Estate Commission to Governor Hughes concerning the results of an investigation by the Commission of these abuses. Significant in relation to some of the legal questions presented herein is the statement in said report: "Our review showed that, in most cases, the New Jersey second mortgage operator would contact or be contacted by a financial outlet, usually in the Philadelphia area, where money was available for second mortgages if a specific procedure was followed." The report showed that the customary procedure involved the use of New Jersey-based brokers, who made contact with or were approached by New Jersey prospective borrowers, in the latter instances usually as a result of advertisements. The broker then would bring the borrower to the financing loan company for consummation of the transaction, frequently in such nearby but out-of-state locations as Philadelphia.

Opinion of the Superior Court of New Jersey, Appellate Division

In approving the bills as enacted Governor Hughes publicly stated:

> "Assembly Bill No. 732 represents a major step forward in the vital area of consumer protection. With the enactment of this bill, New Jersey maintains its place in the forefront of States which have been quickest to recognize and curb the activities of those who would prey upon the public under the guise of legality and respectability. New Jersey once again has branded unethical conduct as unlawful conduct in order to protect its citizens from the hardships of exorbitant financial practices."

II. The Act and Regulations

The act defines a "secondary mortgage loan," in effect, as a loan not to be repaid in 90 days or less which is secured by a mortgage on real property used as dwelling for not more than four families, which property is subject to the lien of a prior mortgage or mortgages, or the purchase of any interest in such a loan. *Section* 1(a). The business of making such loans is restricted to licensees qualifying under the terms of the act. *Section* 2. The holders of 50% of the stock in a corporate licensee, and any individual licensee, must have resided in this State for two years prior to applying for a license. *Section* 3. There are detailed provisions concerning procedure on applications for licenses and renewals thereof to the Commissioner of Banking and Insurance, including payment of an annual fee of $25 and filing a corporate surety bond of $5,000. *Sections* 4 *et seq.* Licensees must indicate location of "the office or branch," *Section* 7; and the application, if by a corporation, must state "where the busi-

ness is to be conducted," *section* 4. There are provisions for hearings on refusals, suspensions or revocations of licenses. *Section* 11. The Commissioner may investigate activities, and examine books and records, *section* 14, which must be maintained by the licensee at its place or places of business in this State, *section* 17.

Section 21 sets forth a mathematical formula for ascertaining the gross dollar amount of interest which the lender may deduct in advance from the face amount of the loan, given the predetermined net proceeds of the loan to be made available to the borrower on closing and the number of installment payment periods for the whole term of the loan and for any calendar year. The parties agree that the formula produces about 14% simple interest per annum on outstanding unpaid principal balances.[2]

Maximum incidental charges which may be made by the lender in respect of "costs, fees, services, points and premiums" are specified as: appraisal and inspection—$50 per parcel of land mortgaged; credit investigation—$15; search fee—$50 per parcel; legal fees—5% of amount of loan, not exceeding $250; recording and filing fees, not to exceed $5 per document. *Section* 22. Borrowers may not be required to pay any fee for the procuring or placement of the loan, but such fees may be paid by the lender to an attorney or licensed realty broker. *Id., subsection* (*b*). The borrower "shall not be compelled to purchase" from the licensee fire, life or title insurance policies. *Id., subsection* (*c*).

Among a variety of kinds of provisions which may not be included in any loan instrument are a power of at-

[2] Plaintiff states that the comparable allowable rate under the Pennsylvania act is 17.38%.

torney of any kind, including any power to confess judgment and any provision whereby the debtor waives any rights accruing to him under the act or any other law. *Section* 23.

The act is not applicable to banking institutions, savings banks, federal savings and loan associations or any "insurance company or other financial institution * * * subject to any other law of this State or the United States" regarding mortgage loan transactions by such institutions. *Section* 31.

We have already mentioned *section* 29, which declares that no obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless negotiated and made in full compliance with the provisions of the act.

Other unmentioned provisions of the act are not implicated in the issues here raised.

Pursuant to his rule-making power under *section* 30 of the act, the Commissioner of Banking and Insurance has promulgated a set of rules, two of which are involved in this litigation. The first is Rule 1, reading:

> "Notwithstanding the place of execution, nominal or real, of a secondary mortgage loan, if the real property is located in this State, said secondary mortgage loan will be deemed to be subject to the Secondary Mortgage Loan Act of 1965 * * *."

The second is Rule 5(d), under which the lender is required to notify the borrower in writing that he has the right to the advice of counsel of his own choosing before signing the loan papers.

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III. The Instant Transaction

Most of the pertinent facts are undisputed; the parties disagree as to others. We propose to decide this appeal on certain of the material facts which are palpably free of any genuine issue and suffice as a matter of law to dictate judgment for defendants. Certain of the undisputed facts have already been related. Some of the assertions as to disputed facts will be mentioned as enlightening background.

Defendant Anthony E. Stefanelli made two affidavits in resistance to plaintiff's motion for summary judgment, alleging the following. Prior to June 6, 1966 (when he made the loan) he was "contacted by a brokerage firm in South Jersey who asked [him] whether [he] needed a loan as [he] had accumulated some debts which [he] wanted to consolidate. Shortly thereafter [he] was contacted by Rodney Radhill, of 1401 Reed Street, Philadelphia, who informed [him] that he would be able to procure the money for [him]." On June 6 Radhill took him to plaintiff's office where he executed several papers, including a mortgage on his home. However, it was not stated before or during the transaction that this involved a mortgage, and defendant did not "believe" this was a mortgage transaction at any time. After he received the net proceeds of the loan ($937.34; this was the balance after payment during closing by lender of certain of defendant's prior obligations in addition to prepaid interest and other charges on the loan; see *infra*), Radhill cashed the check and retained $350 thereof as the price of a small portable television set he "sold" defendants, explaining he was not allowed to charge a brokerage commission for a loan. Only after he received, at a later

date, a statement of the loan, did Stefanelli realize he had executed a mortgage on his home. Stefanelli further asserted in his affidavit that he was "compelled" to purchase creditor life insurance and creditor accident-health insurance, the premiums therefor having been "incurred" over his objections.

Plaintiff's sole evidential showing on the motion as to Radhill's part in the transaction is an affidavit of its manager that "Plaintiff does not have and never had an agent by the name of Rodney A. Radhill and plaintiff made no requirement for defendants to purchase anything from anyone in order to obtain the loan." However, plaintiff failed to answer responsively an interrogatory requesting it to state who was present at the loan closing.

There is no dispute that defendants did on June 6, 1966 at the Philadelphia office of plaintiff sign and deliver to it a promissory note in the amount of $4,535.28 payable in 36 monthly installments of $125.98 each, beginning July 6, 1966, and also a second mortgage on their Newark home as collateral security for the note. The note contained a power of attorney for entry of judgment thereon. It is conceded there were deductions from the face amount of the note of $1,020.43 for interest, $15 for service charge, creditor life insurance and creditor accident and health premiums of $102.05 and $145.13, respectively, and recording and releasing fees of $6.25. The amount of allowable interest under *section* 21 of the New Jersey act would have been some $758. Plaintiff says it did not "compel" defendants to buy the insurance. From the loan proceeds plaintiff at the direction of defendants paid their existing debts: $500 to Household Finance Corp.; $500 to Central Finance; and $1,309.08 to Geral-

dine Sica; leaving a balance of $937.34 disbursed to defendants (from which they paid $350 to Radhill for the television set, as noted above).

IV. The Pennsylvania Statute

The subject matter regulated under the Consumer Discount Company Act (cited above) is the business of lending sums of $3,500 or less (whether secured or unsecured) and charging interest and fees which aggregate more than 6% per year on unpaid principal balances. *Tit.* 7, *Purdon's, op. cit.*, §6203. Such business is restricted to Pennsylvania corporations licensed by the Secretary of Banking. *Ibid.* Supervision of licensees is comprehensive and comparable to that provided for by the New Jersey act. The amount of interest chargeable is formulated differently from the New Jersey act. It is fixed at $7.50 per $100 per year when the "contract is repayable" within 36 months; if for a longer term, then at $6 per $100 for the remainder of the term. Such interest is computed on the face amount of the loan (including all permissible charges) for the full term of the contract and deductible in advance notwithstanding provision for installment payments.[3] *Section* 6213, subd. E. By way of comparison with the stated $7.50 rate, the formula set forth in *Section* 21 of the New Jersey act would permit an amount of interest which, if computed on the Pennsylvania basis for the $7.50 rate, would work out to about $5.90 per $100 per annum.

[3] The amount of the instant loan complied with the $3,500 limitation since the act provides that that limitation may be exceeded by the amount of interest or other charges authorized by the act. *Section* 6213, subd. E.

The Pennsylvania act also allows: service charge up to $15; extension or deferment charges at the rate of 1½% per month on the amount in arrears; actual official recording fees; the premium for insurance *required or obtained*[4] as security for the loan; attorney's fees and court costs in collection of any contract in default.

Plaintiff argues that comparing allowable interest charges under the New Jersey and Pennsylvania statutes is misleading; that the "cost of money" to the borrower should include the supplemental loan charges, which are potentially heavier in New Jersey. However, the comparison of potential cost of money under the respective statutes will not be determinative, in view of our approach to the issues as developed hereinafter.

We approach the legal questions presented for decision.

V. Residence Requirement—Severability

We have no hesitancy in agreeing with the contention of plaintiff that *section* 3 of the act, requiring that holders of at least 50% of the stock of a corporate applicant (as well as any individual applicant) for a license shall have been residents of New Jersey for two years prior to the application, is unconstitutional. The Attorney General accepts that proposition, acceding to a 1966 unreported decision of the Law Division to that effect. Defendants have offered no defense of the provision, and we conceive none. No reasonable relationship whatever has been advanced or is perceived between the objects

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[4] Compare *section* 22 (c) of the New Jersey act, which provides the borrower shall not be "compelled" to purchase fire, life or title insurance.

of the legislation and the residence requirement for shareholders of a corporate licensee. The act does not require that licensees must be domestic corporations or that any of their officers, agents or managers be residents. *Cf. Osborn* v. *Ozlin*, 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074 (1940); in respect of such requirements a debatable regulatory justification could perhaps be argued. It seems to us highly likely that *section* 3 had no motivation other than to favor New Jersey residents engaged in the consumer lending field as against out-of-staters. We conclude that the requirement of residence for shareholders is void as violative of due process and equal protection. In accord: *Miskell* v. *Termplan Incorporated of Houston*, 381 S. W. 2d 129 (Tex. Civ. App. 1964). There is possibly also implicated the privileges and immunities clause of the United States Constitution, asserted derivatively in this action by plaintiff on behalf of its shareholders. *Cf. Hess* v. *Pawloski*, 274 U. S. 352, 355-356, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

However, defendants and the Attorney General contend that *section* 3 is severable from the remainder of the act, and that plaintiff continues to be barred from recovery on the note, under *section* 29, by virtue of violations in this transaction of other still viable provisions of the statute. We agree.

This enactment has no specific severability clause. But that fact is not determinative of the question, particularly in the light of the general, overall severability clause in R. S. 1:1-10. The governing principle in all cases is whether it can be concluded that the Legislature "designed that the enactment should stand or fall as a unitary whole." *State by McLean* v. *Lanza*, 27 N. J. 516, 527 (1958). It was further there said:

> "[E]ven if there be no such express declaration of separability, an unconstitutional provision in a statute does not affect the validity of a separate article or clause of the enactment, if otherwise valid, unless the two are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other. Where the principal object of the statute is constitutional, and the objectionable provision can be exercised without substantial impairment of the general purpose, the statute is operative except insofar as it may contravene fundamental law. And the question is to be considered in the light of the settled principle that a permissible doubt as to validity is to be resolved in favor of the enactment" (at p. 528).

In particular reference to a regulatory ordinance it has been stated that the ultimate test is whether the ordinance, "stripped of those provisions which are invalid, remains a comprehensive and cohesive regulatory ordinance with appropriate sanctions for its enforcement." *Cranberry Lake Quarry Co.* v. *Johnson*, 95 N. J. Super. 495, 517 (App. Div. 1967), certification denied 50 N. J. 300 (1967). We deem this applicable as well to a regulatory statute.

Applying the indicated criteria, we have no doubt that the statute would have been intended by the Legislature to stand, even with the residence requirement of *section* 3 deleted as void. The legislative background data demonstrates an urgent sense of the necesity in the public interest of close regulation of the operations of the secondary mortgage lending industry to the extent of

their effect upon New Jersey residents. All of the statutory policing regulations and the substantive provisions governing permissible interest rates, other charges and other provisions of loan contracts are left functionally intact and operative notwithstanding invalidation of the shareholder-residence requisite of *section* 3. We therefore hold the statute survives the excision of *section* 3. See *Miskell* v. *Termplan Incorporated of Houston, supra*, 381 S. W. 2d, at p. 131.

VI. Conflict of Laws

Plaintiff contends that appropriate choice-of-law principles require the application of Pennsylvania rather than New Jersey law to the question of the validity of this loan; and since the transaction was valid under Pennsylvania law recovery is not to be denied because of transgressions of the New Jersey act. Strong reliance is placed on *section* 346K, "Contracts for the Repayment of Money Lent," as set forth in *Restatement, Conflict of Laws 2d, Tentative Draft No. 6* (1960). This section was substantially adhered to in the reformulation thereof in the *Proposed Official Draft, Part* II (1968), as §195 thereof, reading:

> "§195. Contracts for the Repayment of Money Lent.
>
> The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with respect to the particular issue, some other state has a more significant relation-

> ship to the transaction and the parties, in which event the local law of the other state will be applied."

Comment (b) states that in determining whether there is a state with a more significant relationship to the transaction and to the parties, resort should be had to the principles set forth in *section* 6 (to be found in *Proposed Official Draft, Part* I (1967)). *Subsection* (1) thereof, which we think determinative of the instant issue, reads:

> "(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

When there is no such directive, various other principles may come into play, including "the relevant policies of the forum." *Subsection* (2) of *section* 6. As we deem *subsection* (1) the guideline which we should follow, not merely because it is embodied in the *Proposed Official Draft* but for the reason that it is inherently sound, we need not explore the alternative contention of defendants that conflicts principles ordinarily applicable will bow where the result would strongly offend a public policy of the forum state or where the preponderance of the significant contacts with the transaction are situate there. See *HIMC Investment Company* v. *Siciliano*, 103 N. J. Super. 27 (Law Div. 1968), where the instant act was held applicable to a transaction entered into in Pennsylvania on the basis of such principles, but where New Jersey contacts were more pronounced than here. See *Kievit* v. *Loyal Protect. Life Ins. Co.*, 34 N. J. 475, 492-493 (1961).

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Defendants contend that *section* 6, *subsection* 1, of the *Restatement, supra,* finds present application in that New Jersey has expressly ordained that the Secondary Mortgage Loan Act should apply to all such loans where the secondary mortgage exacted is on property situate in this State, no matter where the loan contract is executed—in other words, settled the choice of law problem involved. They refer to Rule 1 of the regulations promulgated by the Commissioner of Banking and Insurance, which is to that effect. However, we cannot agree that the Commissioner would have authority under his delegated rule-making power (under *section* 30, to make such rules "as shall be necesary to the establishment and maintenance of a standard of fair, equitable and honest conduct in the transaction of secondary mortgage loans") to promulgate a choice-of-law rule if the statute contained no such provision, express or implied. This is a rule of substantive law, not an administrative implementation of regulatory policies broadly reflected in the language of the statute itself. "The distinction is between the making and the execution of the law." *Abelson's, Inc. v. New Jersey State Board of Optometrists,* 5 N. J. 412, 423-424 (1950).

But we do agree with the alternative argument of defendants that the statute, in the light of its avowed objectives, particularly as illuminated by the legislative history, evinces an unmistakable intent that any secondary mortgage loan, as defined in the act, made by a New Jersey resident involving New Jersey realty be subject to the act notwithstanding execution of the loan documents out of the state and in favor of a foreign corporation. One of the primary evils cited in the investigation preceding adoption of the law, as indicated above, was the enticing of needy New Jersey residents to loan companies

in the Philadelphia area. While it is true that the text of the statute does not express any conditions or qualifications of its applicability in terms of the place of making of the loan, the residence of the lender corporation or the borrower, or even the location of the mortgaged property, the manifest purpose of the legislators in enacting, and of the Governor in approving, this statute was to protect New Jersey residents from overreaching mistreatment of them by out-of-state as well as local lenders taking back secondary mortgages on New Jersey residential real property.

Legislative intent can be discerned by background circumstances revealing the evil sought to be remedied and as thus illuminated may be read into the statute by implication with the same effectiveness as though expressly declared therein. *State* v. *Gill*, 47 N. J. 441, 444 (1966); *Alexander* v. *N. J. Power & Light Co.*, 21 N. J. 373, 379 (1956).

In the official *comment* (b) to *section* 6 of the *Restatement, Conflict of Laws* 2d (1967), *supra*, the reporter says:

> "b. *Intended range of application of statute.* A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the *intended range* of application of a particular statute. The court should give a local statute the range of applica-

tion intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid." (Emphasis added.)

We have no difficulty, applying these precepts, in ascertaining the legislative intention in this instance to be as formulated above and thus as settling (subject to constitutional questions) the choice-of-law issue here under discussion by implied legislative fiat.

Plaintiff calls to its aid decisions elsewhere which in varying unrelated contexts have held loans or other contracts made outside the forum state to be unaffected by local statutes regulating the doing of busines or excess to local courts, frequently on federal constitutional grounds, and it argues the Legislature must be presumed not to have intended an unconstitutional result. But this contention begs the present issue—*i.e.*, the actual intent of the New Jersey Legislature as to the subjection to this law of out-of-state loans to New Jersey borrowers, secured by mortgages on New Jersey lands. We deal with the constitutional problems separately hereinafter.

VII. Equal Protection

Plaintiff asserts that the definition of a secondary mortgage loan in the statute establishes an arbitrary classification among holders of promissory notes, not required by the public policy of the State and consequently depriving plaintiff of the equal protection of the laws

guaranteed by the Fourteenth Amendment. The position is that there is no rational basis for creating for the special treatment of this act, out of the whole category of mortgage lenders, those whose obligation is secured by a secondary mortgage; nor any basis for including mortgages which are only partially the collateral taken for the loan. But we think it obvious that there is. The investigations which preceded adoption of the act revealed that there was a characteristic syndrome pervading the area of transactions infected by the evil sought to be ameliorated. This consisted of the situation of moderately circumstanced persons owning a home or small multi-family dwelling, already heavily encumbered by a first mortgage, and who, being unable to raise money to meet pressing needs from conventional lenders at ordinary interest rates, were compelled to go to high-interest and premium-exacting lenders who typically tightened their security by exacting a secondary mortgage on the borrower's home.

The question is not whether the act dealt with all facets of the evil but whether, in the light of the end sought, it rationally dealt with any distinct phase of it calling for attention and differentiable on a reasonable basis from any others. *David* v. *Vesta Co.*, 45 N. J. 301, 314-317 (1965), and cases cited therein. In view of the background data, and mindful of the heavy presumption of constitutionality of legislation, we are satisfied that the legislative classifictaion here impugned is valid.

VIII. Due process and Interstate Commerce

Plaintiff and *amicus curiae* lay major emphasis on the argument that application of the act to the instant trans-

action creates an undue burden on interstate commerce, in violation of the commerce clause of the United States Constitution. It is also argued that applying the act to loans made outside the state denies due process. It will be convenient to consider these positions together, as the pertinent considerations intermesh.

The complexity of the problems an the infinite variety of factual and policy considerations presented in the whole area of transactions having multi-state aspects has produced much confusion and many divided and inconsistent rulings in the courts, state and federal, over the validity of the efforts of states to regulate local aspects of interstate transactions. "The question as to what is the proper dividing line between the respective powers of Congress and those of the states to regulate commerce has been declared to be the most perplexing and confusing topic in American constitutional law." 15 *C. J. S. Commerce* §5, *p.* 388. That the powers of Congress in regulation of interstate commerce, when exercised, are paramount to and preemptive of those of the states, is elementary. *Id.*, §6, *p.* 390. Of more tenuous substance is the rubric that even as to areas not entered by Congress state regultaion of the subjects of interstate commerce must not "interfere" with or place "undue burdens" upon such commerce. *Id.*, §10, pp. 403-404.

The matter was succinctly stated in *Needl v. Giroux*, 24 N. J. 224 (1957) (involving stoppage of interstate cargo of cigarettes to investigate possible violation of the New Jersey cigarette tax law):

> "A state may protect its local interest by reasonable measures which do not unduly interfere with

interstate commerce, in the absence of federal legislation occupying the area" (at p. 228).

And, in upholding legislation regulating the price of milk moving in interstate commerce, the court said, in *National Dairy Products Corp.* v. *Hoffman*, 40 N. J. 475 (1963):

> "* * * [T]he problem is not whether such [interstate] commerce is interfered with but whether the proved interference constitutes an undue or excessive burden on that commerce. Incidental interference or indirect burdens, which find their source and justification in a reasonable exercise of the police power of a state affected by the transaction, are not transgressive of the United States Constitution, in the absence of some controlling or superseding federal enactment or regulation. Regulation of the price of milk was directed by the Legislature to meet the requirement of local conditions and to protect the public interest from what it found to be the adverse effects of those conditions" (at p. 488).

There can hardly be any question that, *prima facie*, state regulation of consumer loan practices deleteriously affecting substantial numbers of the citizenry is a fit and proper exercise of local police power notwithstanding any incidental effect on interstate commerce. See *Metropolitan Finance Corp.* v. *Matthews*, 265 Wis. 275, 61 N. W. 2d 502 (Sup. Ct. 1953), sustaining state licensing procedures for collection agencies in application to an out-of-state firm doing essentially interstate commerce, where the court quoted the following highly instructive language of the Supreme Court in *United States* v. *South-Eastern Underwriters Asso.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944):

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather *whether, in each case, the competing demands of the state and national interests involved can be accommodated*" (at p. 548, 64 S. Ct., at p. 1171, emphasis added).

Similarly, in *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944), Mr. Justice Frankfurter wrote:

> "Whatever may be the generalities to which these cases give utterance and about which there has been * * * relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances" (at p. 211, 64 S. Ct., at p. 973).

These, we think, are the approaches which should guide us here. New Jersey's strong interest in protecting its citizens from victimization by lenders operating on the

other bank of the Delaware, pursuing their activities through cooperative relations with brokers (whether or not technically agents or independent contractors) who effectively negotiate with the borrowers in this State, should outweigh any incidental effect upon the interstate aspects of the transaction, and save the local legislative remedy for the existing abuses from invalidation under either the commerce or due process clauses.[5]

A significant modern decision relevant to this discussion is *Robertson* v. *People of State of California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946). Involved was the validity of a state statute requiring any insurance agent, broker or solicitor to obtain a state license, in its application to one soliciting for a foreign insurance company not admitted to do business in the state. The court treated the regulation as one of a series stated in the statute to be "designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship" (at p. 447, 66 S. Ct., at p. 1164). In sustaining the validity of the statute whether the agent's acts were regarded as "in" commerce or only as "affecting" it (at p. 448, 66 S. Ct. 1160), the court cited previous Supreme Court decisions sustaining, in the absence of contrary action by Congress, the licensing of agents or brokers for the sale of interstate transportation in order to

[5] It of course does not matter that in this particular transaction the loan terms may not have been as egregious as the generality of the practices which led to enactment of the statute. If the act applies, and is valid, it must be given even-handed effect in all cases within its coverage.

prevent fraud; trainmen engaged in interstate commerce, to secure their competence; the sale on commission of interstate consignments of farm produce to secure honest dealing and financial responsibility; and the activities of custom brokers to secure responsibility in the state courts on claims arising locally. *Ibid.*

It would seem that in comparison with the instances just stated, the instant situation is, *a fortiori*, free from constitutional interdiction on commerce grounds. Indeed, in other phases of its arguments plaintiff contends that this transaction was wholly an intrastate Pennsylvania transaction.

The closest indication available as to how the United States Supreme Court would react to the commerce argument in a case such as this is afforded by the court's dismissal of the appeal in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965), "for want of a substantial federal question." The appeal there was from a judgment of the California District Court of Appeal and denial of hearing thereon by the Supreme Court of that state, opinion reported in *People v. Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1965).

In that case the state Attorney General sought an injunction against the conduct by defendant, a Kentucky corporation, of its small loan business in California without securing a license required by the California statute regulating that type of business. Defendant operated entirely by mail between its home office in Kentucky and borrowers resident in other states, maintaining no employees or offices in California—in other words, a straight interstate

business. The California court rejected the argument of defendant, based upon the commerce clause, and buttressed by citation of the so-called "drummer" cases, *e.g., International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); but see *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961), that the state could not exact a license requirement from a foreign corporation doing purely interstate business with residents of that state. The court noted that the Small Loan Law of California "is legislation designed for the public welfare. 'It is primarily to protect the citizens of this state from fraudulent and unconscionable conduct of those in the lending business * * * and as such, is a matter of local concern * * *. The degree of regulation contained in the laws of this state with reference to loan sharks is not disproportionate to the evils which exist if the lenders are left to their own devices without licensing and without any regulation by the state" (47 Cal. Rptr., at p. 814); and "Fairfax should not be allowed to escape state regulation merely because it is also engaged in interstate commerce" (*id.*, at p. 815). Proper regulation of the business was thought to be impossible without the license requirement. *Ibid.*

Plaintiff and *amicus curiae* present us with an extended attack upon the soundness of the California opinion in *Fairfax Family Fund* but fail to deal with the tangible fact that the United States Supreme Court dismissed the loan company's appeal therefrom for want of a substantial federal question. A clue to the reasoning behind the short *per curiam* of the Supreme Court lies in the more extended discussion in the dissenting opinion of Mr. Justice Douglas. That emphasizes the "drummer" cases as representative of the there asserted view that "our decisions have

heretofore precluded a State from exacting a license of a firm doing an exclusively interstate business as a condition of entry into the State" (382 U. S., at p. 2, 86 S. Ct., at p. 34). The dissent also suggests the reliance of the appellee (and presumably of the court majority) on *Robertson* v. *People of State of California*, *supra*, 328 U. S. 440, 66 S. Ct. 1160, which we have shown above to have manifested a liberal and sympathetic view of state efforts at essential regulation of local incidents of interstate business as against criticism for interference with interstate commerce. In sum, we cannot but construe the dismissal in *Fairfax Family Fund* as strongly suggestive of the validity, in the context of a state statute regulating consumers' loan practices, of New Jersey's exaction from plaintiff of its qualification for a license, as well as of the application to it of the other regulatory provisions in The Secondary Mortgage Loan Act of 1965, insofar as commerce grounds are concerned.

The act is even-handed and non-discriminatory (after excision of *section* 3) in its application to all domestic and foreign corporations engaging in loan transactions within the statutory scope, as interpreted above. By reasonable construction of the act, necessitated by the due process clause, plaintiff need not give up its general office in Philadelphia but must maintain a branch office in New Jersey and there maintain records of its transactions involving secondary mortgages on New Jersey realty for inspection by the Commissioner. In this and the other regulations of the statute mentioned in the briefs there is no invidious discrimination against plaintiff either as a foreign corporation or as engaging in interstate commerce.

In view of the fact that the cases teach us that each species of business must be appraised separately in the light of its own local regulatory requirements and of the nature of its peculiar interstate ramifications, and having the benefit of the dismissal in *Fairfax Family Fund*, we need not tarry long in dealing with the other commerce cases cited by plaintiff and *amicus curiae*. These have to do with altogether different situations. They cite *Allgeyer* v. *State of Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897), which invalidated a Louisiana statute which penalized the entry by domestic corporations into agreements calling for execution out of the state of insurance contracts covering property in the state with companies not in compliance with the insurance laws of the state. First, the fact situation presented there was totally dissimilar from that here. Second, the decision has subsequently been questioned and confined in its application. See *Osborne* v. *Ozlin*, *supra*, 310 U. S., at p. 66, 60 S. Ct. 758, 84 L. Ed. 1074; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 318-319, 63 S. Ct. 602, 87 L. Ed. 777 (1943); *cf. Howell* v. *Rosecliff Realty Co., Inc.*, 52 N. J. 313, at 322-323 (1968) (sustaining local taxation of premiums on insurance written out of the state on property situated here).

Plaintiff also relies on a series of cases holding that a state may not require of a foreign corporation its taking steps to qualify to do business there as a condition of its right to sue there (generally, or on a contract made there) if it does no business in that state except of an exclusively interstate nature. See, typically, *International Text-Book Co.* v. *Pigg*, *supra*. But some of the cases in that field have exhibited considerable readiness to find the local

requirement valid where there was some semblance of local contacts by the foreign corporation apart from its purely interstate business. See *Union Brokerage Co.* v. *Jensen and Eli Lilly & Co.* v. *Sav On-Drugs*, both *supra*. It is apparent that entirely different local policy questions and regulatory problems are posed in the instant case, and that the sanctions imposed also vary markedly from those in the foreign corporation registration cases cited. Furthermore, there were here local contacts of importance which preceded and survived the loan transaction itself. There was a mortgage recorded in New Jersey on land situate therein and ordinarily enforceable only by legal action there. Payments on the loan were to emanate from a borrower resident in that state, exerting an effect on its economy, and, if excessive, possibly on its public resources. *Cf. Howell* v. *Rosecliff Realty Co., Inc., supra*, 52 N. J., at p. 327. And finally, plaintiff's penetration of the New Jersey borrowing market was, in this case, as rendered indisputable by the affidavits, accomplished through the intermediation of a broker operating here. For purposes of the preceding observations, it makes no difference whether or not that broker was, technically, an employee of plaintiff. *Cf. Howell* v. *Rosecliff Realty Co., Inc., supra*, at 326, 327.

In any event, as noted above, the dismissal for lack of a substantial federal question in the *Fairfax Family Fund* case, *supra*, in the face of the *International Text-Book* line of decisions just discussed and relied upon in the dissent in *Fairfax Family Fund*, establishes to our satisfaction that that line of authority does not require a holding here of unconstitutionality on commerce grounds.

In the light of the foregoing discussion, we also find entirely insubstantial the due process argument so far as it rests, as presented, on the circumstance that the loan documents were executed out of the State.

IX. Full Faith and Credit

Finally, plaintiff contends that refusal to apply Pennsylvania law to this transaction would violate the full faith and credit clause of the Constitution. We determined in VI, above, that the Legislature has, by clear implication, decreed that the Secondary Mortgage Loan Act of 1965 should apply to a loan transaction with these incidents whatever its freedom from violation of any law of the state where the papers were signed. But plaintiff says that for the New Jersey Legislature to so ordain violates the full faith and credit clause. We think well settled principles augur a contrary conclusion.

It is clear that the full faith and credit clause does not require a forum state to enforce a contract valid under nonforum law where enforcement would subvert the public policy of the forum state. See *Bradford Electrical Light Co., Inc.* v. *Clapper*, 286 U. S. 145, 160, 52 S. Ct. 571, 76 L. Ed. 1026 (1932); *Klaxon Company* v. *Stentor Electric Manufacturing Company*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Alaska Packers Ass'n.* v. *Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

In the instant case, giving this transaction the protective umbrella of the Pennsylvania statute would not only offend New Jersey policy in a most sensitive area, but would negate a New Jersey statute embodying that policy in terms read above by this court to control the very

transaction involved. In *Casteel* v. *Casteel*, 45 N. J. Super. 338 (App. Div. 1957), we spoke to the issue as follows:

> "Every state is entitled to enforce in its own courts the policy of its own statutes on subjects properly the incidents of its jurisdiction, and the full faith and credit clause of the United States Constitution does not require otherwise unless the conflicting statute or judgment of another state is shown, on some rational basis, to have a superior basis for recognition. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, 547, 548, 55 S. Ct. 518, 79 L. Ed. 1044 (1935)" (at p. 354).

The Pennsylvania statute does not have a claim for recognition to validate this transaction superior to that of the New Jersey statute for subjection of the transaction to its requirements. The freedom of plaintiff ordinarily to contract how and with whom it will does not rationally outweigh the decree of the New Jersey Legislature, born of the baneful background circumstances related above, that whoever, wheresoever resident, would lend to residents of New Jersey on the security of a secondary mortgage on property in that State must comply with the regulatory requisites it has laid down at peril of losing its right of recovery on such a loan in New Jersey courts.

We find the contention grounded on denial of full faith and credit to lack merit.[6]

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[6] Having disposed of the particular constitutional challenges raised herein, we note that the act has also recently been held free from invalidity on grounds of vagueness in various particulars. *Crescent Investments Co.* v. *Commissioner of Banking and Insurance*, 103 N. J. Super. 11 (Ch. Div. 1968).

X. Cancellation of the Mortgage

Pending argument of the appeal, plaintiff, on June 7, 1968, caused the mortgage it took from defendants to be cancelled and discharged of record, and we have granted its motion to add the evidence of that fact to the record. Plaintiff's position is that the discharge of the mortgage relieves the transaction of any coverage by the act. This contention is akin to one of the main grounds on which it prevailed below—that the note and mortgage are separate and distinct and that in an action on the note alone, as here, the taking of the mortgage and any legal incidents thereof are irrelevant to plaintiff's right of recovery thereon.

Both of the stated points miss the policy objective of the act. This was to *prevent the taking* of secondary mortgages on residences as security for a loan unless preceded and accompanied by compliance with the statutory regulations, and this for reasons sufficiently explained hereinabove. The legislative policy is prophylactic as well as curative. Only by the application of the stringent sanctions set forth in the act did the Legislature conceive that *entry into* such unauthorized transactions could be adequately deterred. To allow a lender to get by with the exaction of a secondary mortgage as security for a loan violative of the act, and to defeat the application of sanctions, when challenged, by *then* cancelling the mortgage, would be to defeat the effectiveness of the sanction as a deterrent.

XI. Violations Calling for Sanctions

Section 29 of the act reads:

> "No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the provisions of this act."

Defendants' position is that they were entitled to summary judgment under section 29 on the ground of a number of asserted violations of the act, some of which were the subject of factual dispute on the cross-motions for summary judgment and others not.

The asserted violations involving disputed issues of fact were:

(a) fraud and misrepresentation as to any mortgage being involved in the transaction; (b) being compelled to purchase insurance; (c) exaction by plaintiff's agent of an unauthorized brokerage fee through the enforced purchase of a television set.

If the case for plaintiff's violation of the act depended upon any of the foregoing, the matter would have to be remanded for trial of the factual issues. In view of our conclusion as to the effect of some of the undisputed violations, this will be unnecessary.[7]

The asserted undisputed failure to obtain a license; violations of the Act itself are: (a) the plaintiff's; (b)

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[7] Ground (a) depends on whether the sanction of nonenforcement can be applied to a statutory ground for suspension or revocation of a license under *section* 11, such as commission of any fraud, engaging in any dishonest activities or misrepresentation, as distinguished from any absolutely prohibited act. We need not decide the question.

exaction of excessive interest; (c) inclusion in the note of a power of attorney to confess judgment.

Defendants also project violation by plaintiff of the Commissioner's regulation 5(d), requiring the lender to give the borrower notice in writing of his right to independent counsel before signing the papers. There is no dispute that no such notice was given. As to this contention, however, we seriously doubt that a sanction as heavy as preclusion of the right to sue to recover any part of the loan is applicable to violation of a regulation of the Commissioner as distinguished from violation of the act. The pertinent section (29) speaks only in terms of failure of "compliance with the provisions of this act." Elsewhere in the statute, by contrast, there is reference to violation of "this act or any rules or regulations promulgated pursuant thereto." *Section* 14. See also *section* 11(c).

Nor could we, in the circumstances here presented, forfeit plaintiff's entire chose in action for failure to have obtained a license. Under *section* 3 it would have been futile for plaintiff to have applied for a license, as it did not qualify thereunder. To date there has been no *reported* decision at all, delaring the section invalid. It would be grossly unfair, therefore, to penalize plaintiff by depriving it of its right of action on the note on this ground. However, all "persons" (as defined in the act, *section* 1(*b*)) engaging in transactions covered by the act henceforth are herewith put on notice that the licensing provisions as well as all other valid provisions of the act and regulations are applicable to them.

The remaining undisputed violations of the act—taking of excessive interest and incorporating in the note

a power of attorney to confess judgment—will necessarily require the sanction of *section* 29 to be imposed. The fact that plaintiff did not act on the power of attorney to confess judgment is of no more consequence than its voluntary cancellation of the mortgage, and for the same reasons as stated above in that regard. The note may therefore not be the subject of an action to recover thereon in the courts of this State.

The judgment is reversed and the cause remanded for entry of final judgment in favor of defendants.

APPENDIX D

Supplemental Opinion, Superior Court of New Jersey, Appellate Division

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli, et al.* (filed February 24, 1969)

Conford, S. J. A. D. On September 11, 1968 this court held the Secondary Mortgage Loan Act of 1965 (N.J.S.A. 17:11A-1 *et seq.*; L. 1965, c. 91) to be, in the main, a valid enactment, constitutionally applicable in relation to the enforcement of the obligation on a secondary mortgage loan to New Jersey borrowers, secured by real property situated in this State, although the loan agreement was executed in Pennsylvania and the loan repayable in that state to a lender which was a Pennsylvania corporation carrying on a loan business in that state under authority of a licensing statute there in effect. *Oxford Consumer Dis. Co. of No. Phila.* v. *Stefanelli*, 102 N. J. Super. 549. We consequently barred recovery by plaintiff lender of any part of the loan or interest due thereon, finding that the loan agreement called for interest in excess of that allowed by the New Jersey act and was violative of the act in one other respect. We acted under the mandate of *section* 29 of the act, which provides that no obligation arising out of a secondary mortgage loan (as defined by the act) shall be enforceable in the courts of this State unless negotiated and made in full compliance with the provisions of the act. Certain other allegations by defendants as to violations of the act were not passed upon, as they involved disputes of fact which had not been duly tried.

Thereafter, we denied an application by the plaintiff for rehearing. At the same time, however, we granted a petition of First Mercantile Consumer Discounts Company ("First Mercantile"), another Pennsylvania small loan

company, for leave to intervene in the cause for the purpose of permitting it to be heard to contend on petition for rehearing that the September 11, 1968 decision of the court should be held not to have retroactive effect as to loan transactions entered into before the effective date of that decision by Pennsylvania corporations licensed in the State of Pennsylvania to make such loans, where the loans were not only made there but were also repayable there and in all other respects in conformity with Pennsylvania law.

We allowed the intervention, although such action on appeal is quite rare and granted only in extraordinary circumstances—see *Hurd v. Illinois Bell Telephone Company*, 234 F. 2d 942, 944 (7 Cir. 1956); *McKenna v. Pan American Petroleum Corporation*, 303 F. 2d 778, 779 (5 Cir. 1962)—on the basis of the following showing.

First Mercantile and another Pennsylvania loan company had been sued by certain of their New Jersey borrowers, prosecuting a class action in the Chancery Division, for an injunction to restrain enforcement of all secondary mortgage loans made on the security of New Jersey realty by such corporations, although the loan agreements of plaintiffs in those actions were all executed and provided to be repaid in Pennsylvania. Pending the appeal in the instant case we had granted First Mercantile leave to appeal an order of the Chancery Division permitting the continued prosecution of the suit as a class action.

First Mercantile filed proofs on its petition for intervention in the present case, showing it had made secondary mortgage loans secured by New Jersey realty amounting to approximately $5.5 million, all of which would be uncollectible if our decision of September 11, 1968 were

applied retrospectively; that such a result would be catastrophic, causing insolvency of First Mercantile's parent corporation, throwing 50 of its employees out of work, and jeopardizing loans of about $8 million to these corporations made by various banks, insurance companies and other lenders; that unless an early judicial declaration as to the inapplicability of the decision retrospectively to Pennsylvania lenders in First Mercantile's position were forthcoming, its many New Jersey borrowers would repudiate their obligations and cause ruin to the company; and that it had made loans on secondary mortgages on New Jersey realty, notwithstanding enactment of the New Jersey act in 1965, on the basis of advice of both Pennsylvania and New Jersey counsel that these loans were Pennsylvania transactions subject to Pennsylvania law and not subject to the Secondary Mortgage Loan Act of 1965 or any other New Jersey law.

Upon inquiry by the court, *amicus curiae* Middle Atlantic Finance Association advises that nine of its Pennsylvania members had made out-of-state secondary mortgage loans secured by New Jersey real estate, prior to September 11, 1968, aggregating $4,460,881.96 (not inclusive of loans by First Mercantile but including loans by plaintiff). An undeterminable additional amount of such loans has been made by other Pennsylvania members of that organization.

In addition to the original parties and *amicus*, Paul V. Durkin and Ellen Durkin, plaintiffs in the aforementioned pending class action against First Mercantile, have been admitted herein as *amici curiae* to file a brief and to argue in opposition to the position of that intervenor. Plaintiff supports the position of intervenor, having considerable

stake in the issue by virtue of other loans outstanding affected by our September 11, 1968 decision. However, as noted, we have already denied its petition for rehearing of this case in relation to the effect of the decision in relieving the Stefanelli defendants of liability, taking the view that the latter are entitled to retain the fruits of their victory regardless of our conclusion as to the pending request for restrictive application of the decision to other loans. See *Goldberg* v. *Traver*, 52 N. J. 344, 347 (1968). The Stefanellis nevertheless join the Attorney General and the Durkins in opposition to the position of the intervenor.

The proponents of intervenor's position rest their basic argument on the alleged unfairness and injustice of applying the September 11, 1968 holding to loans made prior thereto so as to wipe out all their equity in these loans, but they concede[1] that they should justly be confined to recovery of the principal sums and to such interest and other charges (so far as agreed to in the loan transaction) which do not exceed the maximum permitted by New Jersey or Pennsylvania law, whichever is lower. *Cf. Ditmars* v. *Camden Trust Co.*, 10 N. J. 471, 494-98 (1952). The Attorney General adamantly opposes judicial extension of any consideration to intervenor and contends for literal application of section 29 of the act, barring any recovery at all on secondary mortgage loans violative of the act in any respect, whenever made. He takes the position that the public policy declared by the Legislature should not be modified to any degree because the principle

[1] Subject to their reserved right to challenge the entire decision on its merits on appeal to the New Jersey Supreme Court.

of prospective application of judicial decisions is not properly invocable in the existing circumstances.

Intervenor and plaintiff contend that they reasonably relied, after adoption of the act in 1965, upon what they urge was the then generally held view that loans made in a particular state by a lender organized in that state, to be repayable there, were governed as to validity by the law of that state, even if secured by lien on real estate situated elsewhere. That general principle enjoys some color of support in *Proposed Official Draft of the Restatement, Conflict of Laws* (1968), § 195, "Contracts for Repayment of Money Lent," comment (a). (This section and comment are also found in earlier drafts.) The contention is, further, that the reliance by this court in its decision of September 11, 1968, on § 6 (1) of the 1967 *Restatement* draft, as to the controlling effect of a direction as to a choice of a law contained in a statute of the forum, was novel and surprising in that there is no express provision in the New Jersey act as to choice of law and in that this court found an implied direction in the act for control of the questioned transaction by the provisions of the act—an implication which intervenor's advisers should not be blamed for not having also drawn from the act. See 102 N. J. Super. at pp. 563-564. It is argued that average, competent counsel would not have predicted this court's decision on the choice of law question but rather would have concluded that Pennsylvania law controlled as to the validity of the loan in the circumstances presented.

It is further maintained by the supporters of the intervenor's position that none of the Pennsylvania corporate lenders could have complied with the requirement of section 3 of the act that holders of at least 50% of the stock

in corporate applicants for lending licenses should have been residents of New Jersey for two years prior to the application. Although we held that provision of the act unconstitutional (and severable from the remainder) (102 N. J. Super., at pp. 560-562), it is argued that the existence of the requirement in the act as passed nevertheless contributed to the reasonable overall impression of Pennsylvania corporate lenders not owned to the extent of 50% by New Jersey residents, and thus not capable of qualifying as licensees under the act, that they would surely not be held to come under the confiscatory sanctions of the act as to loans made and repayable in Pennsylvania although secured by secondary mortgages on New Jersey realty.

Finally, although the point is not made in any of the briefs on the intervenor's side, there was discussion at the oral argument as to whether there was some element of surprise or novelty in the determination of this court in the September 11, 1968 decision that application of the statute to such transactions as are here involved did not offend the Commerce Clause of the Federal Constitution, in view of the court's substantial reliance in that regard on the 1965 dismissal for want of federal jurisdiction of the appeal in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965) (102 N. J. Super., at pp. 570-572), and in further view of the general constitutional prohibition of local state licensing requirements in relation to exclusively interstate transactions. See *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961).

There is no question but that appellate courts in this State and elsewhere have long regarded themselves

as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice to those affected, seemed to call for such treatment. *Great Northern R. Co.*, v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932); *State* v. *Johnson*, 43 N. J. 572, 582-583 (1965), affirmed *sub nom. Johnson* v. *New Jersey*, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); *Goldberg* v. *Traver*, 52 N. J. 344 (1968); *Irwin* v. *Irwin*, 443 P. 2d 931 (Okl. Sup. Ct. 1965); *Johson* v. *Stoveken*, 52 N. J. Super. 460 (App. Div. 1958); *State* v. *Koonce*, 89 N. J. Super. 169, 185 (App. Div. 1965). The decision in *Wangler* v. *Harvey*, 41 N. J. 277 (1963), illustrates the variations in viewpoint reasonably entertainable by different judges as to whether justifiable reliance on a previous notion of the law could be found in reference to a particular case of judicial reformulation of the law (the majority of the court held there was no justifiable prior reliance).

While most of the decided cases on prospective effect concern decisions expressly overruling previous holdings and announcing explicit changes in the law, see Levy, "Realist Jurisprudence and Prospective Overruling," 109 U. Pa. L. Rev. 1 (1960), *passim*, the practice is not limited to such cases but may also apply to situations where a court renders a first-instance or clarifying decision in a murky or uncertain area of the law but under circumstances where members of the public or public entities could be found to have previously, and not unreasonably relied on a different conception of the state of the law. See *Goldberg* v. *Traver*, *supra* (52 N. J., at pp. 346-347); *Irwin* v. *Irwin*, *supra* (433 P. 2d, at p. 934);

Coffey v. *Anderson*, 371 S. W. 2d 624, 626 (Ky. Ct. App. 1963); *Nani* v. *Zoning Board of Review of Town of Smithfield*, 242 A. 2d 403 (R. I. Sup. Ct. 1968). It is noteworthy that in all of the first three of the last-cited cases the new determination of the state of the law, held applicable only prospectively, involved matters of statutory construction. This suffices to refute any notion that the doctrine of prospective effect is necessarily inapplicable to determinations of statutory or constitutional construction as distinguished from those of common law.

We thus turn to considerations of whether members of the public in the position of First Mercantile, that is to say, Pennsylvania corporations making loans in Pennsylvania, repayable there, and complying in all respects with applicable Pennsylvania regulatory statutes, but secured by secondary mortgages on New Jersey realty, will be unfairly and unjustly treated if such loans, made prior to the effective date of our September 11, 1968 decision, are rendered totally uncollectible in this State by virtue of that decision.

The Attorney General points to certain evidence, collected *ex parte* and set forth in his appendix, tending to show that principles in the plaintiff corporation and First Mercantile, or in associated corporations, were active in inquiries of the New Jersey Department of Banking and Insurance concerning the reach of the act shortly after its adoption. The president of First Mercantile, appearing on behalf of a New Jersey corporation, attended a hearing relating to adoption of proposed rules and regulations of the Department implementing the act, one of which, Rule 1, declared that notwithstanding the place of execution of a secondary mortgage loan, it would be deemed subject to the act if the real property is located

in this State (a rule held invalid in the September 11, 1968 decision, 102 N. J. Super., at p. 564).

The Attorney General further shows that a Pennsylvania finance association lawyer testified at the departmental hearing in opposition to the residency requirements in *section* 3; also that an officer of a company associated with the present plaintiff corporation inquired as to the effect of the act as against Pennsylvania licensed discount companies, and was sent a response calling attention to Rule 1 and various sections of the act, including *section* 29. On December 6, 1965 a corporation associated with the present plaintiff and a Pennsylvania association of finance companies, of which the parent corporation of First Mercantile was a member, sued the Commissioner of Banking and Insurance in the Chancery Division to enjoin enforcement of a number of provisions of the act (but not Rule 1), and on March 17, 1966 judgment was entered in that action holding *section* 3 to be unconstitutional. It is also shown that New Jersey corporations associated, respectively, with First Mercantile and plaintiff, obtained licenses under the act, and that one of them has made some New Jersey loans pursuant thereto.

We regard the foregoing data as of rather limited significance in relation to the issue before us. It evidences at most that certain of the Pennsylvania small loan interests were conscious of and concerned about the possible effect of the New Jersey act upon loans they might make in Pennsylvania secured by secondary mortgages on New Jersey realty. But this does not necessarily manifest that they were unreasonable in relying upon legal advice that if made in Pennsylvania, and re-

payable there, the loans would be governed as to legality solely by the law of Pennsylvania, in which state the lending corporations were organized and licensed to make such loans. See 102 N. J. Super., at p. 559. The intervenor agrees with the Attorney General that, in principle, the existence of reliance by laymen on prior law should be judged by what "competent legal counsel" would have advised. We would add the qualification, "legal counsel of average competence."

It is difficult for a court which has examined at length into the merits of the conflict of laws and interstate commerce questions and formulated conclusions thereon, as we did in the September 11, 1968 decision, now retrospectively to hypothesize the advice that counsel of average legal competence would have given the Pennsylvania companies as to their right to enter into these transactions free from imperilment of their investment because of the 1965 New Jersey statute. But we think that in arriving at an ultimate decision herein we should weigh the probabilities in relation to the foregoing factor in the light of the magnitude of the potential losses of the lenders as compared with the amount of gains to individual borrowers consequent upon a rejection of the doctrine of prospective application in this case.

Applying that approach, we have concluded that on the basis of the showing of the intervenor and plaintiff, overall considerations of fairness and justice call for some degree of restriction of retroactive application of our September 11, 1968 decision in relation to loans by licensed Pennsylvania lenders made prior to the effective date thereof, where the loans comported with the regulatory Pennsylvania law, the agreements were exe-

cuted in that state, and the obligations were repayable there. We are satisfied that there could be said to have been sufficient doubt in advance of our decision that the New Jersey act applied to such loans, whether constitutionally, with relation to choice of law, or otherwise, especially as to lending corporations having less than 50% of shareholders resident in New Jersey, that, weighed against the potential catastrophic effect thereof on some of such lenders, unrestricted retroactive operation of the decision should be disallowed.

The question remains as to precisely what restrictions on retroactivity should be imposed.

We have concluded that we should not now go beyond adjudicating relief from retroactivity in respect of transactions where there was no intermediation of any kind by others, operating in this State, between Pennsylvania lender and New Jersey borrower.

We are clear, first, that Pennsylvania lenders obtaining New Jersey loan business on a regular, continuing basis by or through agents, brokers, or representatives operating in this State, whether or not technically independent contractors, could not reasonably have been advised in advance that choice of law and interstate commerce factors would immunize the loans from the effect of the New Jersey act. As to such loans, therefore, the decision of September 11, 1968 will remain fully retroactive. As to any other type of case involving some degree of causal intermediation between the lender and the borrower by operatives functioning in this State, the court should appraise the particular facts of the individual case for determination as to whether considerations of fairness and justice call for relief from retro-

activity of the September 11, 1968 decision in such instance, according to the criteria discussed above.

It is next necessary to decide whether there should be any curtailment of the lender's claim to interest and other charges where it ultimately qualifies otherwise for relief from retroactivity. As heretofore noted, plaintiff and intervenors contend that fairness would be served by requiring the borrowers to pay the interest rates and other charges (if specifically agreed to in the loan contract) allowed for such transactions by either the New Jersey or Pennsylvania statute, whichever is the lower. We think some further curtailment of recoverable interest is appropriate in order to give a degree of substantial effect to the circumstance that, in finality, the lenders have violated New Jersey law as substantively determined by our prior decision. Therefore recovery will be limited to 6% per annum simple interest computed on principal balances outstanding on funds actually advanced.

In relation to other loan charges, in view of the fact that, by and large, aggregate allowable charges to borrowers are heavier under the New Jersey statute than that of Pennsylvania (102 N. J. Super., at pp. 556, 560), we regard it as fair to allow the lender to retain any charges contracted for which are allowable under the Pennsylvania statute.

The opinion of the court heretofore rendered in the cause is to be taken as supplemented by this determination on the petition for rehearing of the intervenor.

APPENDIX E

Opinion of Superior Court of New Jersey, Law Division, Essex County

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli* (Judgment filed November 3, 1967)

Plaintiff is a Pennsylvania Corporation, a licensed consumer discount company in that state. The defendant is a resident of New Jersey.

From the affidavits the following facts appear:

The defendants went to Philadelphia, Pennsylvania, and there entered into a loan transaction with the plaintiff. The defendant on June 6, 1966 at Philadelphia, Pennsylvania, entered into a loan transaction with the plaintiff at which time he executed a promissory note for $4,535.28 and executed in Pennsylvania a second mortgage on property located in New Jersey to secure the note. The entire transaction was executed in Pennsylvania and in accordance with Pennsylvania law.

Defendant contends he did not know this was a secondary mortgage transaction, that he was led to the plaintiff's place of business by Sidney Padhill to whom he paid a brokerage fee by the purchase of a T.V. set.

Plaintiff and defendant now move for summary judgments.

In an action on a promissory note, secured by a mortgage on property located in New Jersey the law of Pennsylvania determines the validity of the note. *Buzzone* v. *Hartford Accident and Indem. Co.*, 23 N. J. 447 (1957) p. 452.

The New Jersey Secondary Mortgage Loan Act of 1965 has no application to plaintiff's suit on the note.

Opinion of Superior Court of New Jersey, Law Division, Essex County

Plaintiff's motion for summary judgment on the note in the sum of $5,071.82 is granted.

A judgment recovered upon a debt secured by a mortgage does not merge with the mortgage nor operate as a discharge, abandon or release of the mortgage security. *Silver* v. *Williams*, 79 N. J. Super. 456, 462 (Ch. Div. 1961).

The law of New Jersey controlls the validity of the mortgage but does not in any way affect the plaintiff's right to execute on defendant's real estate to satisfy the judgment herein granted.

Defendant's motion for summary judgment is denied.

Plaintiff's attorney will submit appropriate order consented to as to form by defendant's attorney.

APPENDIX F

New Jersey Secondary Mortgage Loan Act of 1965. L. 1965; c. 91, §1 *et seq.* N.J.S.A. 17:11A-1 *et seq.*

17:11A-1. DEFINITIONS

In this act, unless the context otherwise requires, the following words shall have the following meanings:

a. "Secondary mortgage loan" means (1) a loan made to an individual or partnership not to be repaid in 90 days or less which is secured in whole or in part by a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families, which property is subject to the lien of one or more prior mortgages or (2) the purchase of any interest in an existing mortgage made to secure such a loan.

b. "Person" means an individual, corporation, partnership or any other group of individuals however organized, but does not include any banking institution, savings bank, association subject to chapter 144 of the laws of 1963,[1] Federal savings and loan association, insurance company or any other financial institution which is subject to any other law of this State or of the United States regulating the power of such institution to engage in mortgage loan transactions.

c. "Licensee" means any person duly licensed by the commissioner pursuant to this act.

d. "Commissioner" means the Commissioner of Banking and Insurance of New Jersey.

e. "Payment period" means the period of time scheduled by the terms of a secondary mortgage loan to elapse

[1] Section 17:12B-1 et seq.

between the days upon which installment payments are required to be made on such loan.

f. "Net proceeds" means the difference between the full amount of a secondary mortgage loan and the amount of interest taken in advance upon such loan pursuant to this act. L. 1965, c. 91, § 1.

17:11A-2. NECESSITY FOR LICENSE

No person shall make or negotiate, or offer to make or negotiate, any secondary mortgage loan in the regular course of business unless he or his broker, agent or other representative shall have first obtained a license from the commissioner as provided for by this act. A person shall not be deemed to be acting in the regular course of business if he makes or negotiates not more than 2 secondary mortgage loans in a calendar year. L. 1965, c. 91, § 2.

17:11A-3. RESIDENCE REQUIREMENTS

Every applicant for a license under this act shall have been a bona fide resident of this State for a period of at least 2 years prior to the date of filing the application for such license. In the case of a corporate applicant, the holder or holders of at least 50% of the stock of such corporation shall have resided in this State for a period of at least 2 years prior to the date of filing the application. L. 1965, c. 91, § 3.

17:11A-4. APPLICATION FOR LICENSE; FORM; CONTENTS

(a) Application for a license under this act shall be in writing, under oath, and shall be in the form prescribed by the commissioner.

(b) The application shall state the name and residence and business addresses of the applicant, and if the applicant is a copartnership or association, of every member thereof, and if a corporation, of each officer, director and stockholder thereof. It shall also state the address where the business is to be conducted and any other information the commissioner may require. L. 1965, c. 91, § 4.

17:11A-5. ACTION BY COMMISSIONER ON APPLICATION

Within 60 days after the filing of the application and the payment of the fees hereinafter set forth the commissioner shall either:

(a) Issue and deliver to the applicant a license to engage in the business of making or negotiating secondary mortgage loans in accordance with the provisions of this act at the location specified in the said application; or

(b) Refuse to issue the license for any reason for which the commissioner may suspend, revoke or refuse to renew any license under section 11 of this act.[1] L. 1965, c. 91, § 5.

17:11A-6. DUTIES OF COMMISSIONER UPON DENIAL OF LICENSE

If the commissioner refuses to issue a license he shall:

(a) Notify the applicant of the denial and of his right to request a hearing within 10 days.

(b) If the applicant does not request a hearing, return the sum paid as a license fee.

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[1] Section 17:11A-11.

(c) If the applicant requests such a hearing, give notice of the grounds for refusal and hold a hearing thereon. Within 30 days thereafter the commissioner shall file a written decision containing his findings and conclusions and serve a copy thereof upon the applicant. L. 1965, c. 91, § 6.

17:11A-7. LICENSE; NAME AND LOCATION; TRANSFERABILITY

(a) Each license shall specify the location of the office or branch and must be conspicuously displayed therein. In case such location be changed, the commissioner shall indorse the change of location on the license without charge.

(b) Such license shall not be transferable or assignable.

(c) No licensee shall transact the business provided for by this act under any other name or maintain an office at any other location than that designated in the license. L. 1965, c. 91 § 7.

17:11A-8. LICENSE FEE; RENEWAL

Every licensee shall pay to the commissioner at the time of making the application and annually thereafter upon renewal a license fee of $25.00. L. 1965, c. 91, § 8.

17:11A-9. BOND; FORM; CONDITIONS; LIABILITY

Every licensee shall file with the commissioner a corporate surety bond in the principal sum of $5,000.00. Such bond shall be in form satisfactory to the commissioner and shall be issued by a surety company authorized to transact business in this State. The bond shall run to the State and shall be conditioned that the licensee will

comply with the provisions of this act. The aggregate liability of the surety on the bond shall in no event exceed the amount of such bond. L. 1965, c. 91, § 9.

17:11A-10. ABATEMENT IN AMOUNT OF LICENSE FEE; EXPIRATION OF LICENSE

No abatement in the amount of said license fee shall be made if the license is issued for less than 1 year, nor if the license is surrendered, canceled or revoked prior to the expiration of the period for which such license was issued. Every license shall expire on December 31 of each year. L. 1965, c. 91, § 10.

17:11A-11. SUSPENSION, REVOCATION OR REFUSAL TO RENEW LICENSE; NOTICE; HEARING; FINDINGS BY COMMISSIONER

The commissioner may suspend, revoke or refuse to renew any license issued hereunder, upon 10 days' notice in writing, forwarded by registered or certified mail to the principal place of business of such licensee, stating the contemplated action and in general the grounds therefor, and after reasonable opportunity to be heard, if he shall find that the licensee or any owner, director, officer, member, partner, stockholder, employee or agent of such licensee has:

(a) made any material misstatement in the application;

(b) committed any fraud, engaged in any dishonest activities, or misrepresented or failed to disclose any of the material particulars of any secondary mortgage loan transaction to any one entitled to such information;

(c) violated any of the provisions of this act or of any rule or regulation promulgated pursuant thereto;

(d) otherwise demonstrated unworthiness, bad faith, dishonesty or any other quality indicating that the business of the licensee has not been or will not be conducted honestly, fairly, equitably and efficiently within the purposes and intent of this act. L. 1965, c. 91 § 11.

17:11A-12. SURRENDER OF LICENSE; EFFECT UPON LIABILITY

Any licensee may surrender his license by delivering the license to the commissioner with written notice that he thereby surrenders the license, but such surrender shall not affect the licensee's civil or criminal liability for acts committed prior to the surrender. L. 1965, c. 91, § 12.

17:11A-13. REINSTATEMENT OF SUSPENDED LICENSE; ISSUANCE OF NEW LICENSE AFTER REVOCATION

Every license issued hereunder shall remain in force and effect until the same shall have expired or been surrendered, revoked or suspended in accordance with the provisions of this act, but the commissioner may reinstate suspended licenses or issue new licenses to a licensee whose license or licenses have been revoked, if the conditions under which such licenses were revoked have been corrected and the commissioner is satisfied as the result of an investigation that such conditions are not likely to recur. L. 1965, c. 91, § 13.

17:11A-14. INVESTIGATIONS BY COMMISSIONER; EXAMINATION OF BOOKS, RECORDS AND ACCOUNTS

The commissioner, if he has reasonable cause to believe that any licensee, or any other person, has violated any

of the provisions of this act or of any rules or regulations promulgated pursuant thereto, shall have the power to make such investigations as it shall deem necessary, and may examine the books, accounts, records and files of such licensee or any other such person believed to have violated this act or any rules or regulations promulgated pursuant thereto. L. 1965, c. 91, § 14.

17:11A-15. ISSUANCE OF SUBPOENAS; ADMINISTRATION OF OATHS AND AFFIRMATIONS BY COMMISSIONER

The commissioner shall have power to issue subpoenas to compel the attendance of witnesses and the production of documents, papers, books, records and other evidence before him in any matter over which he has jurisdiction, control or supervision. The commissioner shall have the power to administer oaths and affirmations to any person whose testimony is required. L. 1965, c. 91, § 15.

17:11A-16. FAILURE TO COMPLY WITH SUBPOENA; COURT ORDER; CONTEMPT

In case of a failure of any person to comply with any subpoena issued by the commissioner or to testify with respect to any matter concerning which he may be lawfully interrogated, the Superior Court, on application of the commissioner, may issue an order requiring the attendance of such person and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court as for contempt. L. 1965, c. 91, § 16.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-17. MAINTENANCE OF BOOKS, RECORDS AND ACCOUNTS

Every licensee shall maintain at its place or places of business in this State such books, accounts and records relating to all transactions within this act as will enable the commissioner to enforce full compliance with the provisions of this act. L. 1965, c. 91, § 17.

17:11A-18. PRESERVATION OF BOOKS, RECORDS AND ACCOUNTS

All books, accounts and records of the licensee shall be preserved and kept available as provided herein for such period of time as the commissioner may by regulation require. L. 1965, c. 91, § 18.

17:11A-19. INFORMATION REQUIRED TO BE SHOWN IN BOOKS, RECORDS AND ACCOUNTS

The commissioner is hereby authorized to prescribe the minimum information to be shown in such books, accounts and records of the licensee so that such records will enable the commissioner to determine compliance with the provisions of this act. L. 1965, c. 91, § 19.

17:11A-20. COMPLIANCE OF LOAN WITH TERMS AND CONDITIONS OF ACT

No licensee shall make or offer to make any secondary mortgage loan except on the terms and conditions authorized by this act. L. 1965, c. 91, § 20.

17:11A-21. AMOUNT OF LOAN

A licensee may make a secondary mortgage loan in such an amount that the net proceeds thereof shall equal a predetermined sum, and may take interest in advance

upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The full amount of such loan shall not exceed the aggregate of net proceeds and the amount of interest which may be taken in advance, as determined by the application of the formula,

$$I = \frac{.14\ A\ (P+1)}{2N}$$

in which "I" represents the amount of interest which may be taken in advance; "A" represents the amount of the predetermined net proceeds; "P" represents the number of payment periods contained in the period from the date of the making of the loan to and including the date of maturity of the final installment; and "N" represents, to the nearest whole number, the number of payment periods contained in a calendar year. L. 1965, c. 91, § 21.

17:11A-22. SCHEDULE OF MAXIMUM CHARGES

(a) The following is hereby fixed as the schedule of maximum amounts which may be charged to an applicant for a secondary mortgage loan for costs, fees, services, points and premiums which may be incurred by such applicant in connection with a secondary mortgage loan:

1. Appraisal and inspection fee of $50.00 per parcel or tract of land to be mortgaged.

2. Credit investigation of borrower—$15.00.

3. Search fee of $50.00 per parcel or tract of land to be mortgaged.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

4. Legal fees, including preparation of all documents—5% of the full amount of the mortgage loan, not to exceed the sum of $200.00.

5. Recording and filing fees not to exceed $5.00 per document.

(b) The borrowers shall not be required to pay and commissions, finder's fees or points for the obtaining, procuring or placing of a secondary mortgage loan and such commissions, finder's fees or points, if any, shall be paid by the licensee and only to licensed real estate brokers, attorneys at law of the State of New Jersey or licensees under this act. Any agreement for the payment of such commissions, finder's fees or points, to be enforceable in the courts of this State, shall be in writing, signed by the licensee.

(c) The borrower shall not be compelled to purchase from the licensee fire, life or title insurance policies in connection with a secondary mortgage loan. L. 1965, c. 91, § 22.

17:11A-23. Prohibited provisions

No instrument evidencing or securing a secondary mortgage loan shall contain:

(a) any acceleration clause under which any part or all of the unpaid balance of the obligation not yet matured may be declared due and payable because the holder deems himself to be insecure;

(b) any power of attorney to confess judgment or any other power of attorney;

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

(c) any provision whereby the debtor waives any rights accruing to him under the provisions of this act or of any other law;

(d) any requirement that more than one installment be payable in any one installment period, or that the amount of any installment be greater or less than that of any other installment, except for the final installment which may be in a lesser amount;

(e) any assignment of or order for the payment of any salary, wages, commissions, or other compensation for services, or any part thereof, earned or to be earned. L. 1965, c. 91, § 23.

17:11A-24. STATEMENT OF BORROWER'S ACCOUNT

Upon written request from the borrower the holder of a secondary mortgage loan instrument shall deliver to the borrower within 10 days from a receipt of the written request a statement of the borrower's account showing the date and amount of all payments made or credited to the account and the total unpaid balance. Not more than 2 such statements shall be required in any 12-month period. L. 1965, c. 91, § 24.

17:11A-25. PAYMENT BEFORE MATURITY; REFUND CREDIT

Any borrower may satisfy in full at any time before maturity the amount of any balance due on any secondary mortgage obligation, and in so satisfying any such debt shall receive a refund credit on account of the interest in advance. L. 1965, c. 91, § 25.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-26. REFUSAL OF EXISTING MORTGAGE HOLDERS TO MAKE LOAN

No licensee shall make or negotiate any secondary mortgage loan unless it shall appear, from satisfactory evidence furnished by the applicant, that the holder of every existing mortgage upon the property offered as security for the secondary mortgage loan, other than the licensee, has declined to make a loan in the desired amount on the security of another mortgage upon such property. L. 1965, c. 91, § 26.

17:11-27. FALSE OR MISLEADING ADVERTISING

It shall be unlawful for any person to cause to be placed before the public in this State, directly or indirectly, any false or misleading advertising matter pertaining to secondary mortgage loans or the availability thereof; provided, however, that this section shall not apply to the owner, publisher, operator or employees of any publication or radio or television station which disseminates such advertising matter without knowledge of the false or misleading character thereof. L. 1965, c. 91, § 27.

17:11A-28. VIOLATIONS; PENALTIES

Any person who shall knowingly violate any provision of this act or shall directly or indirectly counsel, aid or abet such violation shall be liable, in addition to all other penalties and forfeitures imposed by this act or by any other law, to a penalty of not more than $1,000.00 for each offense.

Such penalty shall be sued for and recovered by and in the name of the commissioner and shall be collected

and enforced by summary proceedings pursuant to the Penalty Enforcement Law (N.J.S. 2A:58-1 et seq.). L. 1965, c. 91, § 28.

17:11A-29. Enforceability of loans in state courts

No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the provisions of this act. L. 1965, c. 91, § 29.

17:11A-30. Rules and regulations

The commissioner is hereby authorized and empowered to make, alter, amend and repeal such rules and regulations as shall be necessary to the establishment and maintenance of a standard of fair, equitable and honest conduct in the transaction of secondary mortgage loans. L. 1965, c. 91, § 30.

17:11A-31. Effect of act upon existing financial institutions

Nothing contained in this act shall be deemed to have any effect whatever upon the existing powers of any banking institution, savings bank, association subject to the provisions of chapter 144 of the laws of 1963,[1] Federal savings and loan association, or insurance company or other financial institution which is subject to any other law of this State or the United States regulating the power of such institution to engage in mortgage loan transactions, or upon the conditions and limitations imposed by any such law upon the exercise of such powers. L. 1965, c. 91, § 31.

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[1] Section 17:12B-1 et seq.

New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-32. SHORT TITLE

This act shall be known and may be cited as "The Secondary Mortgage Loan Act of 1965." L. 1965, c. 91, § 32.

17:11A-33. EFFECTIVE DATE

This act shall take effect on the ninetieth day next following the enactment thereof and shall be applicable to all secondary mortgage loans which have been entered into or made on or after said date. L. 1965, c. 91, § 33.

APPENDIX G

Pennsylvania Consumer Discount Company Act P. L. 262 §1 et seq. 7 *Purdon's Penn. Stat. Ann.* §6201, et seq.

§ 6201. SHORT TITLE

This act shall be known, and may be cited, as the "Consumer Discount Company Act." 1937, April 8, P.L. 262, § 1.

§ 6202. DEFINITIONS

The following terms shall be construed in the act to have the following meanings, except in those instances where the context clearly indicates otherwise:

"Person" includes an individual, partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any other group of individuals however organized.

"Contract" means a promissory or judgment note, bill of exchange, judgment, mortgage, conditional sales, contract, lease or bailment by which the lessee or bailee has the option of becoming or is bound to become the owner of real or personal property upon full compliance with the terms of the agreement, or any other form of negotiable or nonnegotiable instrument evidencing an agreement to pay a sum certain in money at a fixed or determinable time, either by a single payment or by stated installments.

"Applicant" means a corporation applying for a license under the provisions of this act.

"Licensee" means a corporation holding a license issued under the provisions of this act, which license has not been cancelled, surrendered or revoked and has not expired.

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

"Consumer" means the person who is the maker on a note, or the acceptor of a bill of exchange, or the defendant on a judgment, or the mortgagor on a mortgage, or the lessee on a lease, or the bailee on a bailment, or the purchaser on a conditional sales contract, or the person or persons obligated to pay any other negotiable instrument defined as a "contract" under this act.

"Charges" means and includes all interest or discount and the service charge which a licensee is authorized to collect by the provisions of this act.

"Default" means failure to pay a contract when due or failure to pay any stated installment when due. 1937, April 8, P.L. 262, § 2; 1947, June 20, P.L. 665, § 1.

§ 6203. LICENSE REQUIRED

A. On and after the effective date of this act, no person, partnership, association, foreign business corporation organized under or by virtue of any laws other than those of this Commonwealth, nonprofit corporation, common law trust, joint-stock company, or any other group of individuals however organized, shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money or credit, in the amount of value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced or on the unpaid principal balances when the contract is payable by stated installments:

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

B. On and after the effective date of this act, no domestic business corporation organized under or existing by virtue of the Business Corporation Law of this Commonwealth, and no director, officer, employe, agent or member of such corporation, shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money or credit, in the amount or value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments, without first obtaining a license from the Secretary of Banking of the Commonwealth of Pennsylvania in accordance with the provisions of this act. 1937, April 8, P.L. 262, § 3; 1947, June 20, P.L. 665; § 1; 1963, July 30, P.L. 335, § 1.

§ 6204. APPLICATION FOR LICENSE

The application for such license shall be in writing, under oath and in the form prescribed by the Secretary of Banking. The application shall contain the corporate title of the applicant, which shall include the words "Consumer Discount Company"; the street and number, if any, office building and roof number, if any, city, borough, township or municipality, and county where the business is to be conducted; date of incorporation; name and residence address of all directors; and such other information as the Secretary of Banking may require.

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

A separate application on the prescribed form shall be filed for each place of business conducted by a licensee. 1937, April 8, P.L. 262, § 4.

§ 6205. LICENSE BOND

A bond in the penal sum of five thousand dollars ($5000) shall accompany every application for license. Such bond shall be executed by a surety company authorized by the laws of Pennsylvania to transact business within this Commonwealth. The bond shall be renewed and refiled annually not later than June first for the first three consecutive years from the date on which the licensee was first licensed. The bond shall be executed to the Commonwealth of Pennsylvania and shall be for the use of the Commonwealth and for any person or persons who may have a cause of action against the licensee. The condition of the bond shall be that the licensee will comply with and abide by all the provisions of this act and all the rules and regulations of the Secretary of Banking, lawfully issued in accordance with this act and that the licensee will pay to the Commonwealth to the Secretary of Banking, or to any person or persons, and any and all monies that may come due to the Commonwealth, to the Secretary of Banking, or to any person or persons, from the said licensee under and by virtue of the provisions of this act. If any person shall be aggrieved by the misconduct of a licensee and shall recover judgment against such licensee, such person may, on any execution issued under such judgment, maintain an action upon the bond of the licensee in any court having jurisdiction of the amount claimed, provided the Secretary of Banking assents thereto.

Pennsylvania Consumer Discount Company Act
7 Purdon's Statutes §6201 et seq.

A separate bond shall be provided for each place of business conducted by a licensee. After the licensee has been continuously licensed for three (3) consecutive years, such bond shall not be renewed or refiled unless the Secretary of Banking has reason to believe that such bond is necessary and notifies the licensee in writing on or before May 1 that such bond is required. 1937, April 8, P.L. 262, § 5; 1963, July 30, P.L. 335, § 2.

§ 6206. LICENSE FEE

A license fee of one hundred dollars ($100) shall accompany each application for license under this act. Each license shall remain in full force and effect until surrendered, revoked or suspended as herein provided. The licensee fee of one hundred dollars ($100) shall be paid annually on or before June first. No abatement of the said license fee shall be made if the license is issued for less than one year. An additional license fee of one hundred dollars ($100) shall be paid for each place of business conducted by a licensee.

All license fees and fines received by the Secretary of Banking under this act shall be deposited in the State Treasury to the credit of the Banking Department Fund for the use of the Secretary of Banking in administering this act. 1937, April 8, P.L. 262, § 6; 1963, July 30, P.L. 335, § 2.

§ 6207. ORGANIZATION; MINIMUM CAPITAL

A license under the provisions of this act shall be issued only to a corporation organized under the Business Corporation Law of the Commonwealth of Pennsylvania. Such corporation shall be incorporated with a minimum

capitalization of twenty-five thousand dollars ($25,000). At the time of applying for a license under this act, the minimum subscribed capital shall be twenty-five thousand dollars ($25,000), and the minimum paid in capital shall be ten thousand dollars ($10,000). The minimum subscribed capital of twenty-five thousand dollars ($25,000) shall be fully paid in within one year of the date of issuance of the license. 1937, April 8, P.L. 262, § 7.

§ 6208. Issuance of license

The Secretary of Banking, if he approves the application for license, shall issue to each applicant a certificate showing the name of the corporation and address of the place of business. Such license shall be posted in a conspicuous place in the office of the licensee so that it will be in full view of the public at all times. A license may not be transferred or assigned. A licensee may, with the approval of the Secretary of Banking, change his place of business to another location within the same municipality. A licensee desiring to change his place of business shall give written notice thereof to the Secretary of Banking and return the license certificate to the Secretary of Banking for amendment. The Secretary of Banking, if he approves the removal of the place of business, shall endorse on the license his approval of the change of address and the date thereof, which shall thereafter be the authority for the operation of such business under such license at the new location. No change in the place of business of a licensee to a location outside the original municipality shall be permitted: Provided, however, a licensee may obtain a new license for a place of business in a new location in a municipality other than that in which the original place of business

was located. Only one place of business may be operated under the same license.

A licensee may operate more than one place of business by obtaining a separate license by filing an application for each additional place of business, and by furnishing a bond for each additional place of business and by paying the license fee provided in this act for each additional place of business. 1937, April 8, P.L. 262, §. 8.

§ 6209. Records required

Licensees operating under the provisions of this act shall maintain adequate and complete records of all business transacted, containing such information and in such form as shall be prescribed by the Secretary of Banking by general rule or regulation. The records of licenses shall be maintained in the English language. The records of licensees shall be retained for a period of two years after the date of final payment on any contract. 1937, April 8, P.L. 262, § 9.

§ 6210. Reports to the Secretary of Banking

Licensees operating under the provisions of this act shall annually, on or before the first day of March, file a report with the Secretary of Banking, giving such relevant information concerning the business and operations during the previous calendar year as the Secretary of Banking may require. Such report shall be made under oath and shall be in the form prescribed by the Secretary of Banking. A separate report shall be filed for each place of business maintained by a licensee. The Secretary of Banking may at any time upon thirty (30) days notice require a licensee to file special reports in

addition to the annual report. For failure to file such reports within the time specified, the licensee shall pay to the Secretary of Banking a penalty of ten dollars ($10) for each calendar day which such report is overdue, but the Secretary of Banking may, in his direction, relieve a licensee of any portion or of all such fine. Such fine, which has not been paid by the licensee and for the payment of which the licensee has not been relieved, may be collected by the Secretary of Banking from the bonding company which has executed the bond required under this act, and the Secretary of Banking may maintain an action for the recovery of such fine in any court of competent jurisdiction. 1937, April 8, P.L. 262, § 10.

§ 6211. Examinations by the Secretary of Banking

The Secretary of Banking, and any person designated by him for that purpose, may at any time investigate the business and affairs and examine the books, accounts, papers, records, documents, and files therein of every licensee and of every person who shall be engaged in business contemplated by this act, whether such person shall act or claim to act as principal, agent or broker, or under or without the authority of this act. For this purpose the Secretary of Banking shall have free access to the offices and places of business, books, accounts, papers, records, documents, files, safes and vaults of all such persons. A person, who is not licensed under this act, shall be presumed to be engaged in business contemplated by this act if he advertises or solicits business as principal, agent or brower for which a license is required by the provisions of this act, and the Secretary of Banking, and any person designated by him for that purpose, is in such cases authorized to examine the books, accounts, papers,

records, documents, files, safes and vaults of such persons for the purpose of discovering violations of this act.

The cost of every examination of the business of a licensee by the Secretary of Banking, or his duly authorized representative, shall be paid by the licensee so examined, and the Secretary of Banking may collect such costs from the licensee or from the surety company which has executed the bond required under this act, and he may maintain an action for the recovery of such costs in any court of competent jurisdiction. 1937, April 8, P.L. 262, § 11.

§ 6212. Authority of the Secretary of Banking

The Secretary of Banking shall have the power to reject any application for license if he is satisfied that the financial responsibility, experience, character and general fitness of the person or persons shown on the application for license as officers and directors of the applicant corporation are not such as to command the confidence of the community and to warrant the conclusion that the business will be operated honestly, fairly, and within the intent and purpose of this act and in accordance with the general laws of this Commonwealth: Provided, however, That no license may be issued, if any director, officer, employe, or agent of the applicant corporation has been convicted under this act for engaging in business contemplated by this act without having obtained a license under this act, or if any director, officer, employe, or agent of the applicant corporation was a director, officer, employe, or agent of a corporation which had been convicted of a second offense violation of this act

of Louisiana, 165 U. S. 578; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357. Compare *Home Ins. Co.* v. *Dick*, 281 U. S. 397. Application of the New Jersey Act to the transaction in question (and all others in the same fact pattern) constitutes just such an unconstitutional extension of jurisdiction over foreign transactions. The plain effect of such application—where the foreign lender is precluded from collecting any part of his loan—is one of deprivation of property without due process of law.

4. The Issues Presented in this Case Will Have Applicability Throughout the United States.

At this writing six other states have enacted statutes comparable to the New Jersey Act: Maryland,[19] New Hampshire,[20] Ohio,[21] Rhode Island,[22], Texas,[23] and West Virginia.[24]

The very issues with which the New Jersey courts have been confronted in this case will undoubtedly arise in these other states, for all of them have penalty provisions which to varying degrees deny the lender what he has bargained for if that bargain was not made in

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[19] "Secondary Mortgage Loan Law", L. 1967, ch. 390, 5 Ann. Code Md., Art. 66, §39 *et seq.*

[20] "Second Mortgage Home Loans", L. 1967, 258:2, 4 N.H.R.S.A. §398A:1 *et seq.*

[21] "Second Mortgage Loans", 13 Page's Ohio R. C. A. §1321.51 *et seq.*

[22] "Secondary Mortgage Loans", P. L. 1966, ch. 269, §21 *et seq.*, 4 G.L.R.I. §19-25.2-1 *et seq.*

[23] "Secondary Mortgage Loans", Act 1967, 60th Leg., p. 656, ch. 274 §2, 15 Vernon's Texas C. S., Art. 5069-5.01 *et seq.*

[24] "Secondary Mortgage Loans", L. 1967, c. 31, 10 W. Va. Code, §31-17-1 *et seq.*

conformance with the law of the borrower's home state. Interestingly enough, none of the six states expressly provides that an action may not be brought in its courts for the enforcement of a loan not made in accordance with the provisions of its regulatory statute. Two of them, however, have equivalent forfeiture provisions: Rhode Island has declared that a loan shall be *void* if the lender takes any action in the making or collecting of the loan which is in violation of any provision of the act;[25] West Virginia has pronounced that a loan shall be *void* for any violation of its statute.[26] In Maryland, a violating lender can collect the principal amount of his loan only; and if the violation is "knowing", the lender must pay triple the amount of interest and other charges made which exceed those permitted by law.[27] In New Hampshire, the maker of an "illegal loan" can recover only the principal amount.[28] In Ohio, the violating lender forfeits twice the non-principal contracted for.[29] In Texas, the non-complying lender forfeits twice the interest and other charges obtained from the borrower, plus reasonable attorneys' fees; if the interest and other charges were twice the permitted amount, the lender forfeits all principal as well.[30]

The warning of Chief Justice Weintraub, that the New Jersey Supreme Court's interpretation and application of the New Jersey Act is "at war with the considerations of comity which attend choice of law" (App. 11a-12a)—a declaration of constitutional problems in non-constitu-

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[25] 4 G.L.R.I. §19-25.2-19.

[26] 10 W. Va. Code, §31-17-17.

[27] 5 Ann. Code Md., Art. 66, §69.

[28] 4 N.H.R.S.A. §398A:7.

[29] 13 Page's Ohio R. C. A. §1321.56.

[30] 15 Vernon's Texas C. S., Art. 5069-8.01.

tional language—clearly has repercussions far beyond the borders of the Delaware River. The problems of Oxford and of the Commonwealth of Pennsylvania will plainly be mirrored throughout the states bordering those jurisdictions which have enacted secondary mortgage loan laws. Indeed, approval of the constitutionality of the New Jersey courts' views by this Court will clearly give reason for the judiciaries of all states—including those which have *not* enacted secondary mortgage loan laws—to deny out-of-state lenders access to their courts on the ground that enforcement of such loans involving interest in excess of that permitted by local law is contrary to the forum state's public policy.

5. Conclusion.

For all of the reasons cited above, we believe that the questions presented by this appeal are substantial and of significant public importance. We therefore respectfully request that this Court note probable jurisdiction, so that these constitutional matters may be fully briefed and heard on oral argument.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 257

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

~~*Respondents.*~~ *Appellees*

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

APPENDIX TO JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA

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APPENDIX

Opinion of Supreme Court of New Jersey

Oxford Consumer Discount Company of North Philadelphia v. Stefanelli, et al.

(filed March 17, 1970)

PER CURIAM.

Subject to a qualification to be stated, the judgment of the Appellate Division is affirmed substantially for the reasons expressed below in the exhaustive opinions of Judge Conford. *Oxford Consumer Dis. Co. of No. Phila.* v. *Stefanelli*, 102 N. J. Super. 549 (App. Div. 1968), and 104 N. J. Super. 512 (App. Div. 1969).

The first opinion of the Appellate Division was handed down on September 11, 1968. Prior to that date certain New Jersey borrowers other than the defendants Stefanellis had brought suit against First Mercantile Discount Company and another Pennsylvania loan company in the Superior Court, Chancery Division, seeking an injunction to prevent the enforcement of all secondary mortgage loans made by such corporations on the security of New Jersey realty. Basically the same issues were involved in that action (which the plaintiffs were allegedly prosecuting as a class action) as in the *Oxford* case. Subsequent to September 11, 1968 some of these parties applied to the Appellate Division for leave to intervene and for a rehearing in order to be heard on the issues decided in *Oxford*. The leave was granted and the common problems in the cases were reargued. One of the primary questions presented for further consideration was whether, if the Appellate Division adhered to the view expressed in the September 11, 1968 opinion respecting the applicability of the New Jersey Secondary

Mortgage Loan Act, the judgment should be prospective or retrospective in scope. The position of the loan companies was that in no event should loan transactions made by Pennsylvania corporations licensed in Pennsylvania to make such loans and entered into before the effective date of that decision be adversely affected by it, where the loans were not only made in Pennsylvania but were repayable there and in all other respects were in conformity with Pennsylvania law. (See 104 N. J. Super. at 516).

Thereafter the Appellate Division affirmed its original holding and dealt comprehensively with the prospectivity—retroactivity issue. 104 N. J. Super. at 519-25. It held that sufficient equitable considerations were present to warrant denial of unrestricted retroactive operation of the September 11, 1968 decision. In specifying the restrictions it said:

> 1. "We have concluded that we should not now go beyond adjudicating relief from retroactivity in respect of transactions where there was no intermediation of any kind by others, operating in this State, between Pennsylvania lender and New Jersey borrower."
>
> 2. "We are clear, first, that Pennsylvania lenders obtaining New Jersey loan business on a regular continuing basis by or through agents, brokers, or representatives operating in this State, whether or not technically independent contractors, could not reasonably have been advised in advance that choice of law and interstate commerce factors would immunize the loans from the effect of the New Jersey act. As to such loans, therefore, the decision of September 11, 1968 will remain fully re-

troactive. As to any other type of case involving some degree of casual intermediation between the lender and the borrower by operative functioning in this State, the court should appraise the particular facts of the individual case for determination as to whether considerations of fairness and justice call for relief from retroactivity of the September 11, 1968 decision in such instance, according to the criteria discussed above."

3. "It is next necessary to decide whether there should be any curtailment of the lender's claim to interest and other charges where it ultimately qualifies otherwise for relief from retroactivity. As heretofore noted, plaintiff and intervenors contend that fairness would be served by requiring the borrowers to pay the interest rates and other charges (if specifically agreed to in the loan contract) allowed for such transactions by either the New Jersey or Pennsylvania statute, whichever is the lower. We think some further curtailment of recoverable interest is appropriate in order to give a degree of substantial effect to the circumstance that, in finality, the lenders have violated New Jersey law as substantively determined by our prior decision. Therefore recovery will be limited to 6% per annum simple interest computed on principal balances outstanding on funds actually advanced." (Numbering of paragraphs ours.) 104 N. J. Super. at 524-25.

We take paragraph 3 to mean that in *all* cases of loans made by plaintiffs as well as intervenors and *amici* loan companies to New Jersey borrowers and secured by secondary mortgages on New Jersey realty as defined in N.J.S.A. 17:11A-1a, which are not within the bar of para-

graph 2 above, the lender may recover the sum of the loan as actually advanced but only with 6% simple interest on principal balances outstanding. In our view the equities referred to in the second Appellate Division opinion on the subject of retroactivity of the September 11, 1968 decision require a less drastic limitation.

Assuming the loan transactions of Anthony E. and Theresa A. Stefanelli, defendants in the principal case, and Paul V. Durkin and Ellen Durkin, Lindley Henry, Jr. and Irene Henry, Paul Kuzmick and Jane Kuzmick, plaintiffs in the injunction action referred to above, had been instituted and in existence prior to September 11, 1968 and are not within paragraphs 1 or 2 quoted above, these parties are entitled to retroactive benefit of the decision of that date to this extent: They shall be liable for the agreed installment payments of the principal of the actual loan to them but without interest. Additionally, if their loan transactions resulted from intermediation within the contemplation of paragraphs 1 or 2, the September 11, 1968 decision shall be fully retroactive, and they shall have no liability on their loans.

If there are other persons not named above who were, prior to September 11, actually in litigation challenging the validity of the type of loans that are involved in this case, they too are entitled to the benefit of the rules of retroactivity just described. Further, the September 11, 1968 decision is fully applicable retroactivity to bar all recovery on New Jersey secondary mortgage loans made prior to that date and which were induced by the lender through intermediation of the nature described by paragraphs 1 and 2 above. All other New Jersey secondary mortgage loans of the type involved in this case made before September 11, 1968 which are not within paragraphs

1 and 2 above, and were not in litigation prior to that date remain unaffected by the judgment in this case.

The record shows that the trial court entered summary judgment against Mr. and Mrs. Stefanelli on their note to Oxford. Thus they had no opportunity to develop the facts respecting the intermediation by an alleged agent of Oxford which induced them to enter into the loan transaction. Under the circumstances, and even though their liability on the note is limited to installment payment without interest on the sum actually advanced to them by plaintiff, they are entitled to an opportunity to submit the facts to the trial court relating to intermediation. If such facts are undisputed and bring their case within paragraphs 1 and 2 above, they are entitled to a judgment exonerating them from liability on their note. If the evidence raises a factual dispute on the subject, the issue must be resolved by a jury or the court if the case is tried without a jury.

The judgment of the Appellate Division is affirmed as modified, and the cause is remanded to the trial court for proceedings consistent herewith.

WEINTRAUB, C. J., dissenting.

This case has an emotional overlay for it involves the distastseful business of lending money at predatory rates to people who are poor or soon will be. I would add, irrelevantly to be sure, a regret that government does not provide loans at tolerable interest charges for those of our citizens who need them most. Instead, the impecunious are made a separate class, alone required to underwrite the high credit risk attributed to some of their num-

ber. But this having been said, the fact remains that this unpleasantness has legislative approval here and elsewhere, and the case must be decided in that light and not some personal one. Indeed, there is little to choose between the New Jersey and Pennsylvania statutes here involved. Labels aside, the sundry charges under the statutes permit about the same size gouge.

And it should be stressed that we are not, on this appeal, dealing with a lender who exacts more than either statute allows or who tolerates the intervention of a "broker" who adds a pillage of his own. I have no doubt that in such circumstances our courts should turn the lender away, and may do so without the aid of a statutory denunciation of the loan as unenforceable. Nor are we dealing with a situation in which the lender actually enters our State to recruit borrowers.[1] The record does not reveal how the sizeable number of New Jersey individuals found their way to Philadelphia. For all we know at the moment, it may have been in response to advertisements published or broadcast in Pennsylvania. What we do know is that the borrower went to Pennsylvania and the loan was made and was payable there, all in harmony with a Pennsylvania statute which also is designed to protect the borrower. Nonetheless, the majority opinion in

[1] This case is unlike *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist. Ct. App. 1964), appeal dismissed *sub nom. Fairfax Family Fund* v. *California*, 382 U. S. 1, 15 L. ed. 2d 6 (1965), with respect to both the facts and the issue involved. There a Kentucky corporation solicited loans in California by mail and completed the loan transaction by mail after having a credit check made locally in California, and the question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained.

effect holds the New Jersey statute had a presence in Pennsylvania and denounced every such loan to a New Jersey resident, and this notwithstanding that if the loan were made in Pennsylvania on the terms of the New Jersey statute, the loan would have violated the Pennsylvania law.

If our Legislature ordained that every loan made anywhere in the world to a citizen of New Jersey shall be wholly void unless the loan is on terms authorized by New Jersey law, I suspect we would waste little time on that enactment. Yet this, I believe, is precisely the rule the majority opinion innovates and applies. This would be evident at once if the scene were not obscured by the fact that the lender took a "secondary mortgage" on New Jersey property as collateral. But the issue is not whether the mortgage is valid, but whether the loan itself is forfeited because of the existence of our statute, and upon that question the nature of the security cannot reasonably be pivotal.

Indeed, it is hard to grasp the true role of the mortgage under our statute. We can be sure the Legislature was not concerned with the integrity of the real property system of the State, for obviously the mortgage creates no title problem. Rather the Legislature must have had in mind the oppressive capacity of the threat of foreclosure. Yet the statute does not really implement that theme. The amount of the loan does not depend upon the value of the security. The loan may be in any amount whatever, provided only that the lender takes a "secondary mortgage." In this respect the Pennsylvania statute is more protective, for it, like most statutes permitting charges above the basic interest rate, at least fixes a monetary limit upon the loan. 7 P. S. § 6214A. And not only need there be

no relationship under our statute between the value of the security and the amount of the loan, but more than that, the real property need not belong to the borrower or be his home, for the statute requires only "a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families." N.J.S.A. 17:11A-1a. Nor must the property be in New Jersey, or the borrower a resident of this State.

One need not be unusually perceptive to see the fine hand of lenders in the drafting of this legislation, for, there being no required connection between the value of the security and the loan, the mortgage provision simply enables the lender to loan, at the high charges authorized by this statute, any amount the lender chooses to risk, provided only that the lender does not fail to take a secondary mortgage as a qualifying facade. Indeed, we were told in this case, and also at a public hearing held last year (with respect to whether the holder of a note and mortgage should be required to foreclose a mortgage before suing on the note), that the secondary mortgage (whatever its *in terrorem* effect may be on the borrower) is not, realistically, security for these loans; that the economics are such that a foreclosure is a waste of money and hence is rarely pursued.

In any event, the "secondary mortgage" is not so central to the fairness of the transaction as to distinguish this statute from any other of our usury statutes with respect to the immediate issue, *i.e.*, whether a loan made outside our State to a resident of our State is wholly void because, although obedient to the law of the State where the loan was negotiated, made and payable, the loan is not on terms which a statute of ours would permit if the loan were made here. If the Pennsylvania loan were made without the mortgage security (and under Pennsylvania

law the lender is not required to take that security), the terms of the loan would still clash with those of our statute. These are sundry pressures which one State might permit and another might not, such as a chattel mortgage, or a wage assignment, or a power of attorney to confess judgment. The greatest oppression may be in the interest rate itself, and the threat of judicial enforcement of the promise to pay it. If it is correct to forfeit a foreign loan because a secondary mortgage was taken, it would be equally correct to forfeit every such loan for any other departure from our domestic statutory scheme.

That is why I believe the majority opinion must ultimately amount to this extraordinary proposition, that any loan to a New Jersey resident made anywhere is wholly void if it would violate our usury statutes if made here, even though the loan was authorized by the law of the place where it was negotiated, made and payable.

When we speak of "choice of law," we ought not to be blind to the consequences proposed. It may not be unreasonable to construe an insurance policy in accordance with the law of the place of residence of the assured, or to deny a specific remedy, or to limit the fruit of a transaction. But it should not be assumed that considerations which will lead to such consequences under "choice of law" will also support a forfeiture of what a party to the transaction has paid. It is one thing to refuse some measure of relief. It is dramatically different to denounce the transaction as void and to forfeit what was lawfully loaned under the law of the place of the loan.

As I understand them, the opinions in the Appellate Division and the majority opinion in our Court conclude that the Legislature itself dictated the "choice of law" and mandated the forfeiture of a loan negotiated, made

and payable in another State. I cannot find a trace of any such legislative decision.[2] There is not a single provision in the statute which intimates that New Jersey residents will carry the statute in their pockets wherever they go. The statute speaks only of loans made here. N.J.S.A. 17:11A-2 requires the issuance of a "license," and N.J.S.A. 17:11A-17 requires the licensee to keep books and records, not in Pennsylvania, Arizona, California, or Hawaii, but "at its place or places of business in this State." That the statute was intended to deal only with loan transactions within this State is perfectly evident from N.J.S.A. 17:11A-3, which required (unconstitutionally, as later adjudged) that an applicant for a license "shall have been a bona fide resident of this State for a period of at least 2 years prior to the date of filing the application for such license" and that in the case of a corporate applicant, the holder or holders of at least 50% of the stock "shall have resided in this State for a period of at least 2 years prior to the date of filing the application." In view of those terms, it cannot be said the Legislature itself made a "choice of law" and dictated that whenever a conflict-of-laws problem arises, the courts must apply the provision of N.J.S.A. 17:11A-29 that "No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the pro-

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[2] Compare the provision of N.J.S.A. 17:10-20 of the "Small Loan Law," as amended by L. 1967, c. 94, § 16, which speaks expressly of loans made elsewhere to a resident of our State and which purports to deny enforcement of such loans except when "the amount of interest, discount, consideration or other charges for such loan, demanded to be paid in such action, does not exceed that permitted to a licensee by this chapter for a loan of the same amount payable in the same manner."

visions of this act." Indeed, that view of the statute must condemn it as plainly arbitrary, for the statute would then mean that a secondary mortgage upon the real property described in the statute will void every loan, made upon any terms whatever, unless the loan is made by someone who is licensed under this statute and is present in New Jersey.

The "choice of law" issue is in our hands without any legislative prescription. I think it unreasonable to forfeit a loan upon the factual hypothesis now before us. Rather, the sensible course is to sustain the transactions with whatever modification our local policy may be thought to mandate. Thus, if the interest rate is found to be hostile to a strong legislative policy, it may be reduced. Here, as already noted, the Pennsylvania statute and the New Jersey statute seem to authorize nomenclature to one side, the same total exaction from the borrower. Or if the secondary mortgage as such is thought to be intolerably offensive to our statute, we could order the mortgage cancelled. So, too, we could deny any other remedy the loan agreement may give the lender if that remedy is thus offensive. See *Restatement Second, Conflict of Laws, Part II* (Proposed Official Draft, 1968), §§ 195 and 203. Indeed, such relief, if justified, should not be limited to borrowers who were or are residents of our State, for the same policy considerations must protect as well any borrower the lender pursues in our jurisdiction.

It should be remembered that other States can do what we do. Our statute does not forbid loans to residents of Pennsylvania, and a New Jersey lender would violate our statute if it made a loan here on the terms of the Pennsylvania statute. The courts of Pennsylvania could give our lender the same treatment we here accord its domiciliary. I think this is short-sighted and at war with the

considerations of comity which attend a choice of law. One can foresee still a further complication. If a Pennsylvania lender obtains judgment against a New Jersey borrower by service under a Pennsylvania long-arm statute, what then? We need not invite this discord to vindicate our State policy.

Hence, wholly apart from any constitutional issue, we should not forfeit the loan negotiated, made and payable in another State merely because the borrower was a resident of New Jersey and the terms of the loan, valid where made, do not coincide with what our statute requires or permits. I would reverse the judgment and remand the matter to the trial court for trial of the remaining issues, including the question whether there was an unauthorized brokerage charge to the knowledge of the lender.

Mr. Justice Hall and Mr. Justice Hangman join in this dissenting opinion.

Judgment of the Supreme Court of New Jersey

R. 2:11-3(b) of the N. J. Court Rules, 1969 provides in part that

> "The opinion of the appellate court shall include its judgment, and no other form of judgment shall be required . . . . The date of the filing of the opinion shall be deemed to be the date of the entry of the judgment."

Supplemental Opinion, Superior Court of New Jersey, Appellate Division

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli, et al.* (filed February 24, 1969)

CONFORD, S. J. A. D. On September 11, 1968 this court held the Secondary Mortgage Loan Act of 1965 (N.J. S.A. 17:11A-1 *et seq.*; L. 1965, c. 91) to be, in the main, a valid enactment, constitutionally applicable in relation to the enforcement of the obligation on a secondary mortgage loan to New Jersey borrowers, secured by real property situated in this State, although the loan agreement was executed in Pennsylvania and the loan repayable in that state to a lender which was a Pennsylvania corporation carrying on a loan business in that state under authority of a licensing statute there in effect. *Oxford Consumer Dis. Co. of No. Phila.* v. *Stefanelli*, 102 N. J. Super. 549. We consequently barred recovery by plaintiff lender of any part of the loan or interest due thereon, finding that the loan agreement called for interest in excess of that allowed by the New Jersey act and was violative of the act in one other respect. We acted under the mandate of *section* 29 of the act, which provides that no obligation arising out of a secondary mortgage loan (as defined by the act) shall be enforceable in the courts of this State unless negotiated and made in full compliance with the provisions of the act. Certain other allegations by defendants as to violations of the act were not passed upon, as they involved disputes of fact which had not been duly tried.

Thereafter, we denied an application by the plaintiff for rehearing. At the same time, however, we granted a petition of First Mercantile Consumer Discount Company ("First Mercantile"), another Pennsylvania small loan

company, for leave to intervene in the cause for the purpose of permitting it to be heard to contend on petition for rehearing that the September 11, 1968 decision of the court should be held not to have retroactive effect as to loan transactions entered into before the effective date of that decision by Pennsylvania corporations licensed in the State of Pennsylvania to make such loans, where the loans were not only made there but were also repayable there and in all other respects in conformity with Pennsylvania law.

We allowed the intervention, although such action on appeal is quite rare and granted only in extraordinary circumstances—see *Hurd* v. *Illinois Bell Telephone Company*, 234 F. 2d 942, 944 (7 Cir. 1956); *McKenna* v. *Pan American Petroleum Corporation*, 303 F. 2d 778, 779 (5 Cir. 1962)—on the basis of the following showing.

First Mercantile and another Pennsylvania loan company had been sued by certain of their New Jersey borrowers, prosecuting a class action in the Chancery Division, for an injunction to restrain enforcement of all secondary mortgage loans made on the security of New Jersey realty by such corporations, although the loan agreements of plaintiffs in those actions were all executed and provided to be repaid in Pennsylvania. Pending the appeal in the instant case we had granted First Mercantile leave to appeal an order of the Chancery Division permitting the continued prosecution of the suit as a class action.

First Mercantile filed proofs on its petition for intervention in the present case, showing it had made secondary mortgage loans secured by New Jersey realty amounting to approximately $5.5 million, all of which would be uncollectible if our decision of September 11, 1968 were

applied retrospectively; that such a result would be catastrophic, causing insolvency of First Mercantile's parent corporation, throwing 50 of its employees out of work, and jeopardizing loans of about $8 million to these corporations made by various banks, insurance companies and other lenders; that unless an early judicial declaration as to the inapplicability of the decision retrospectively to Pennsylvania lenders in First Mercantile's position were forthcoming, its many New Jersey borrowers would repudiate their obligations and cause ruin to the company; and that it had made loans on secondary mortgages on New Jersey realty, notwithstanding enactment of the New Jersey act in 1965, on the basis of advice of both Pennsylvania and New Jersey counsel that these loans were Pennsylvania transactions subject to Pennsylvania law and not subject to the Secondary Mortgage Loan Act of 1965 or any other New Jersey law.

Upon inquiry by the court, *amicus curiae* Middle Atlantic Finance Association advises that nine of its Pennsylvania members had made out-of-state secondary mortgage loans secured by New Jersey real estate, prior to September 11, 1968, aggregating $4,460,881.96 (not inclusive of loans by First Mercantile but including loans by plaintiff). An undeterminable additional amount of such loans has been made by other Pennsylvania members of that organization.

In addition to the original parties and *amicus*, Paul V. Durkin and Ellen Durkin, plaintiffs in the aforementioned pending class action against First Mercantile, have been admitted herein as *amici curiae* to file a brief and to argue in opposition to the position of that intervenor. Plaintiff supports the position of intervenor, having considerable

stake in the issue by virtue of other loans outstanding affected by our September 11, 1968 decision. However, as noted, we have already denied its petition for rehearing of this case in relation to the effect of the decision in relieving the Stefanelli defendants of liability, taking the view that the latter are entitled to retain the fruits of their victory regardless of our conclusion as to the pending request for restrictive application of the decision to other loans. See *Goldberg* v. *Traver*, 52 N. J. 344, 347 (1968). The Stefanellis nevertheless join the Attorney General and the Durkins in opposition to the position of the intervenor.

The proponents of intervenor's position rest their basic argument on the alleged unfairness and injustice of applying the September 11, 1968 holding to loans made prior thereto so as to wipe out all their equity in these loans, but they concede[1] that they should justly be confined to recovery of the principal sums and to such interest and other charges (so far as agreed to in the loan transaction) which do not exceed the maximum permitted by New Jersey or Pennsylvania law, whichever is lower. *Cf. Ditmars* v. *Camden Trust Co.*, 10 N. J. 471, 494-98 (1952). The Attorney General adamantly opposes judicial extension of any consideration to intervenor and contends for literal application of section 29 of the act, barring any recovery at all on secondary mortgage loans violative of the act in any respect, whenever made. He takes the position that the public policy declared by the Legislature should not be modified to any degree because the principle

[1] Subject to their reserved right to challenge the entire decision on its merits on appeal to the New Jersey Supreme Court.

of prospective application of judicial decisions is not properly invocable in the existing circumstances.

Intervenor and plaintiff contend that they reasonably relied, after adoption of the act in 1965, upon what they urge was the then generally held view that loans made in a particular state by a lender organized in that state, to be repayable there, were governed as to validity by the law of that state, even if secured by lien on real estate situated elsewhere. That general principle enjoys some color of support in *Proposed Official Draft of the Restatement, Conflict of Laws* (1968), § 195, "Contracts for Repayment of Money Lent," comment (a). (This section and comment are also found in earlier drafts.) The contention is, further, that the reliance by this court in its decision of September 11, 1968, on § 6 (1) of the 1967 *Restatement* draft, as to the controlling effect of a direction as to a choice of a law contained in a statute of the forum, was novel and surprising in that there is no express provision in the New Jersey act as to choice of law and in that this court found an implied direction in the act for control of the questioned transaction by the provisions of the act—an implication which intervenor's advisers should not be blamed for not having also drawn from the act. See 102 N. J. Super. at pp. 563-564. It is argued that average, competent counsel would not have predicted this court's decision on the choice of law question but rather would have concluded that Pennsylvania law controlled as to the validity of the loan in the circumstances presented.

It is further maintained by the supporters of the intervenor's position that none of the Pennsylvania corporate lenders could have complied with the requirement of section 3 of the act that holders of at least 50% of the stock

in corporate applicants for lending licenses should have been residents of New Jersey for two years prior to the application. Although we held that provision of the act unconstitutional (and severable from the remainder) (102 N. J. Super., at pp. 560-562), it is argued that the existence of the requirement in the act as passed nevertheless contributed to the reasonable overall impression of Pennsylvania corporate lenders not owned to the extent of 50% by New Jersey residents, and thus not capable of qualifying as licensees under the act, that they would surely not be held to come under the confiscatory sanctions of the act as to loans made and repayable in Pennsylvania although secured by secondary mortgages on New Jersey realty.

Finally, although the point is not made in any of the briefs on the intervenor's side, there was discussion at the oral argument as to whether there was some element of surprise or novelty in the determination of this court in the September 11, 1968 decision that application of the statute to such transactions as are here involved did not offend the Commerce Clause of the Federal Constitution, in view of the court's substantial reliance in that regard on the 1965 dismissal for want of federal jurisdiction of the appeal in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965) (102 N. J. Super., at pp. 570-572), and in further view of the general constitutional prohibition of local state licensing requirements in relation to exclusively interstate transactions. See *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961).

There is no question but that appellate courts in this State and elsewhere have long regarded themselves

as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice to those affected, seemed to call for such treatment. *Great Northern R. Co., v. Sunburst Oil & Ref. Co.*, 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932); *State* v. *Johnson*, 43 N. J. 572, 582-583 (1965), affirmed *sub nom. Johnson* v. *New Jersey*, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); *Goldberg* v. *Traver*, 52 N. J. 344 (1868); *Irwin* v. *Irwin*, 443 P. 2d 931 (Okl. Sup. Ct. 1965); *Johson* v. *Storeken*, 52 N. J. Super. 460 (App. Div. 1958); *State* v. *Koonce*, 89 N. J. Super. 169, 185 (App. Div. 1965). The decision in *Wangler* v. *Harvey*, 41 N. J. 277 (1963), illustrates the variations in viewpoint reasonably entertainable by different judges as to whether justifiable reliance on a previous notion of the law could be found in reference to a particular case of judicial reformulation of the law (the majority of the court held there was no justifiable prior reliance).

While most of the decided cases on prospective effect concern decisions expressly overruling previous holdings and announcing explicit changes in the law, see Levy, "Realist Jurisprudence and Prospective Overruling," 109 U. Pa. L. Rev. 1 (1960), *passim*, the practice is not limited to such cases but may also apply to situations where a court renders a first-instance or clarifying decision in a murky or uncertain area of the law but under circumstances where members of the public or public entities could be found to have previously and not unreasonably relied on a different conception of the state of the law. See *Goldberg* v. *Traver*, *supra* (52 N. J., at pp. 346-347); *Irwin* v. *Irwin*, *supra* (433 P. 2d, at p. 934);

Coffey v. *Anderson*, 371 S. W. 2d 624, 626 (Ky. Ct. App. 1963); *Nani* v. *Zoning Board of Review of Town of Smithfield*, 242 A. 2d 403 (R. I. Sup. Ct. 1968). It is noteworthy that in all of the first three of the last-cited cases the new determination of the state of the law, held applicable only prospectively, involved matters of statutory construction. This suffices to refute any notion that the doctrine of prospective effect is necessarily inapplicable to determinations of statutory or constitutional construction as distinguished from those of common law.

We thus turn to considerations of whether members of the public in the position of First Mercantile, that is to say, Pennsylvania corporations making loans in Pennsylvania, repayable there, and complying in all respects with applicable Pennsylvania regulatory statutes, but secured by secondary mortgages on New Jersey realty, will be unfairly and unjustly treated if such loans, made prior to the effective date of our September 11, 1968 decision, are rendered totally uncollectible in this State by virtue of that decision.

The Attorney General points to certain evidence, collected *ex parte* and set forth in his appendix, tending to show that principles in the plaintiff corporation and First Mercantile, or in associated corporations, were active in inquiries of the New Jersey Department of Banking and Insurance concerning the reach of the act shortly after its adoption. The president of First Mercantile, appearing on behalf of a New Jersey corporation, attended a hearing relating to adoption of proposed rules and regulations of the Department implementing the act, one of which, Rule 1, declared that notwithstanding the place of execution of a secondary mortgage loan, it would be deemed subject to the act if the real property is located

in this State (a rule held invalid in the September 11, 1968 decision, 102 N. J. Super., at p. 564).

The Attorney General further shows that a Pennsylvania finance association lawyer testified at the departmental hearing in opposition to the residency requirements in *section* 3; also that an officer of a company associated with the present plaintiff corporation inquired as to the effect of the act as against Pennsylvania licensed discount companies, and was sent a response calling attention to Rule 1 and various sections of the act, including *section* 29. On December 6, 1965 a corporation associated with the present plaintiff and a Pennsylvania association of finance companies, of which the parent corporation of First Mercantile was a member, sued the Commissioner of Banking and Insurance in the Chancery Division to enjoin enforcement of a number of provisions of the act (but not Rule 1), and on March 17, 1966 judgment was entered in that action holding *section* 3 to be unconstitutional. It is also shown that New Jersey corporations associated, respectively, with First Mercantile and plaintiff, obtained licenses under the act, and that one of them has made some New Jersey loans pursuant thereto.

We regard the foregoing data as of rather limited significance in relation to the issue before us. It evidences at most that certain of the Pennsylvania small loan interests were conscious of and concerned about the possible effect of the New Jersey act upon loans they might make in Pennsylvania secured by secondary mortgages on New Jersey realty. But this does not necessarily manifest that they were unreasonable in relying upon legal advice that if made in Pennsylvania, and re-

payable there, the loans would be governed as to legality solely by the law of Pennsylvania, in which state the lending corporations were organized and licensed to make such loans. See 102 N. J. Super., at p. 559. The intervenor agrees with the Attorney General that, in principle, the existence of reliance by laymen on prior law should be judged by what "competent legal counsel" would have advised. We would add the qualification, "legal counsel of average competence."

It is difficult for a court which has examined at length into the merits of the conflict of laws and interstate commerce questions and formulated conclusions thereon, as we did in the September 11, 1968 decision, now retrospectively to hypothesize the advice that counsel of average legal competence would have given the Pennsylvania companies as to their right to enter into these transactions free from imperilment of their investment because of the 1965 New Jersey statute. But we think that in arriving at an ultimate decision herein we should weigh the probabilities in relation to the foregoing factor in the light of the magnitude of the potential losses of the lenders as compared with the amount of gains to individual borrowers consequent upon a rejection of the doctrine of prospective application in this case.

Applying that approach, we have concluded that on the basis of the showing of the intervenor and plaintiff, overall considerations of fairness and justice call for some degree of restriction of retroactive application of our September 11, 1968 decision in relation to loans by licensed Pennsylvania lenders made prior to the effective date thereof, where the loans comported with the regulatory Pennsylvania law, the agreements were exe-

cuted in that state, and the obligations were repayable there. We are satisfied that there could be said to have been sufficient doubt in advance of our decision that the New Jersey act applied to such loans, whether constitutionally, with relation to choice of law, or otherwise, especially as to lending corporations having less than 50% of shareholders resident in New Jersey, that, weighed against the potential catastrophic effect thereof on some of such lenders, unrestricted retroactive operation of the decision should be disallowed.

The question remains as to precisely what restrictions on retroactivity should be imposed.

We have concluded that we should not now go beyond adjudicating relief from retroactivity in respect of transactions where there was no intermediation of any kind by others, operating in this State, between Pennsylvania lender and New Jersey borrower.

We are clear, first, that Pennsylvania lenders obtaining New Jersey loan business on a regular, continuing basis by or through agents, brokers, or representatives operating in this State, whether or not technically independent contractors, could not reasonably have been advised in advance that choice of law and interstate commerce factors would immunize the loans from the effect of the New Jersey act. As to such loans, therefore, the decision of September 11, 1968 will remain fully retroactive. As to any other type of case involving some degree of causal intermediation between the lender and the borrower by operatives functioning in this State, the court should appraise the particular facts of the individual case for determination as to whether considerations of fairness and justice call for relief from retro-

activity of the September 11, 1968 decision in such instance, according to the criteria discussed above.

It is next necessary to decide whether there should be any curtailment of the lender's claim to interest and other charges where it ultimately qualifies otherwise for relief from retroactivity. As heretofore noted, plaintiff and intervenors contend that fairness would be served by requiring the borrowers to pay the interest rates and other charges (if specifically agreed to in the loan contract) allowed for such transactions by either the New Jersey or Pennsylvania statute, whichever is the lower. We think some further curtailment of recoverable interest is appropriate in order to give a degree of substantial effect to the circumstance that, in finality, the lenders have violated New Jersey law as substantively determined by our prior decision. Therefore recovery will be limited to 6% per annum simple interest computed on principal balances outstanding on funds actually advanced.

In relation to other loan charges, in view of the fact that, by and large, aggregate allowable charges to borrowers are heavier under the New Jersey statute than that of Pennsylvania (102 N. J. Super., at pp. 556, 560), we regard it as fair to allow the lender to retain any charges contracted for which are allowable under the Pennsylvania statute.

The opinion of the court heretofore rendered in the cause is to be taken as supplemented by this determination on the petition for rehearing of the intervenor.

Opinion of the Superior Court of New Jersey, Appellate Division

Oxford Consumer Discount Company of North Philadelphia v. *Stefanelli, et al.* (filed September 11, 1968).

Conford, S. J. A. D. This appeal presents important questions relating to the validity and applicability to plaintiff, a Pennsylvania loan company not authorized to do business in New Jersey, of the Secondary Mortgage Loan Act of 1965 (L. 1965, c. 91, N.J.S.A. 17:11A-1 *et seq.*),[1] and regulations of the Commissioner of Banking and Insurance promulgated pursuant thereto, more specifically in respect of its loan to defendants, residents of New Jersey, secured by a second mortgage on their Newark home. The Attorney General has been granted leave to intervene on the side of defendants to defend the validity of the act and regulations; and Middle Atlantic Finance Association to file a brief *amicus curiae*, which has been helpful. It has also participated in the oral argument.

The Superior Court, Law Division, granted summary judgment for $5,071.82 in favor of plaintiff in its action on a note executed June 6, 1966 by defendants at the Philadelphia office of plaintiff and there delivered to it, that transaction being purportedly authorized by the Pennsylvania statute, *Tit.* 7, *Purdon's Pa. Stat.*, §§ 6201-6219 ("Consumer Discount Company Act"). At the same time the court denied defendants' motion for summary judgment. Enforcement of the mortgage taken as security for the loan at the same time the note was delivered was not sought or involved in the action.

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[1] Reference herein to section numbers of the Act will identify corresponding numbers in N.J.S.A. E.g., section 1 is N.J.S.A. 17:11A-1.

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Although the scope of defenses to the action now advanced is not identical with those set forth in the original pleadings, we have concluded that the questions of public policy implicated in the appellate arguments are so significant and the desirability in the public interest of present judicial determination thereof so obvious that we ought to decide all relevant legal questions argued on the appeal insofar as the record permits us to do so. None of the parties has contended for a narrower approach.

Basically, defendants and the Attorney General argue that the Secondary Mortgage Loan Act of 1965 is applicable to this transaction; and that there were several violations of that act in the course of the transaction, thereby calling into play section 29 of the act precluding enforcement in the courts of this State of any obligation arising out of a secondary mortgage loan not negotiated and made in full compliance with the provisions of the act. Defendants also contend there was fraud by plaintiff in that they were not advised and did not know that the papers they signed included a mortgage on their home.

Plaintiff asserts the New Jersey statute does not and constitutionally cannot apply to this transaction; that the loan was valid under the Pennsylvania statute regulating such transactions; that conflict of laws principles call for application of the Pennsylvania rather than the New Jersey statute in resolving the validity and enforceability of the loan, and that denial of enforcement of the cause of action by New Jersey would violate the due process, equal protection, interstate commerce and full faith and credit clauses of the United States Constitution.

Opinion of the Superior Court of New Jersey, Appellate Division

I. Legislative Background

The Secondary Mortgage Loan Act of 1965 emerged as a compromise of proposals embodied in three bills in the 1965 session of the Legislature, *Assembly Nos.* 522 and 732; and *Senate No.* 244. Its adoption was preceded by widespread complaints to the authorities concerning false and fraudulent advertising of the availability of loans and terms thereof and the exaction of exorbitant rates of interest and concomitant other charges from needy borrowers. Typically, the lenders in these transaction required the furnishing by borrowers of mortgages on their homes as security, and generally the financial difficulties of the borrowers were such that the mortgages given were necessarily junior liens to existing mortgages on their properties.

These conditions were fully documented in a report dated January 5, 1965 from the Secretary-Director of the New Jersey Real Estate Commission to Governor Hughes concerning the results of an investigation by the Commission of these abuses. Significant in relation to some of the legal questions presented herein is the statement in said report: "Our review showed that, in most cases, the New Jersey second mortgage operator would contact or be contacted by a financial outlet, usually in the Philadelphia area, where money was available for second mortgages if a specific procedure was followed." The report showed that the customary procedure involved the use of New Jersey-based brokers, who made contact with or were approached by New Jersey prospective borrowers, in the latter instances usually as a result of advertisements. The broker then would bring the borrower to the financing loan company for consummation of the transaction, frequently in such nearby but out-of-state locations as Philadelphia.

In approving the bills as enacted Governor Hughes publicly stated:

> "Assembly Bill No. 732 represents a major step forward in the vital area of consumer protection. With the enactment of this bill, New Jersey maintains its place in the forefront of States which have been quickest to recognize and curb the activities of those who would prey upon the public under the guise of legality and respectability. New Jersey once again has branded unethical conduct as unlawful conduct in order to protect its citizens from the hardships of exorbitant financial practices."

II. The Act and Regulations

The act defines a "secondary mortgage loan," in effect, as a loan not to be repaid in 90 days or less which is secured by a mortgage on real property used as dwelling for not more than four families, which property is subject to the lien of a prior mortgage or mortgages, or the purchase of any interest in such a loan. *Section* 1(a). The business of making such loans is restricted to licensees qualifying under the terms of the act, *Section* 2. The holders of 50% of the stock in a corporate licensee, and any individual licensee, must have resided in this State for two years prior to applying for a license. *Section* 3. There are detailed provisions concerning procedure on applications for licenses and renewals thereof to the Commissioner of Banking and Insurance, including payment of an annual fee of $25 and filing a corporate surety bond of $5,000. *Sections* 4 *et seq.* Licensees must indicate location of "the office or branch," *Section* 7; and the application, if by a corporation, must state "where the busi-

ness is to be conducted," *section* 4. There are provisions for hearings on refusals, suspensions or revocations of licenses. *Section* 11. The Commissioner may investigate activities, and examine books and records, *section* 14, which must be maintained by the licensee at its place or places of business in this State, *section* 17.

Section 21 sets forth a mathematical formula for ascertaining the gross dollar amount of interest which the lender may deduct in advance from the face amount of the loan, given the predetermined net proceeds of the loan to be made available to the borrower on closing and the number of installment payment periods for the whole term of the loan and for any calendar year. The parties agree that the formula produces about 14% simple interest per annum on outstanding unpaid principal balances.[2]

Maximum incidental charges which may be made by the lender in respect of "costs, fees, services, points and premiums" are specified as: appraisal and inspection—$50 per parcel of land mortgaged; credit investigation—$15; search fee—$50 per parcel; legal fees—5% of amount of loan, not exceeding $250; recording and filing fees, not to exceed $5 per document. *Section* 22. Borrowers may not be required to pay any fee for the procuring or placement of the loan, but such fees may be paid by the lender to an attorney or licensed realty broker. *Id., subsection* (*b*). The borrower "shall not be compelled to purchase" from the licensee fire, life or title insurance policies. *Id., subsection* (*c*).

Among a variety of kinds of provisions which may not be included in any loan instrument are a power of at-

[2] Plaintiff states that the comparable allowable rate under the Pennsylvania act is 17.38%.

torney of any kind, including any power to confess judgment and any provision whereby the debtor waives any rights accruing to him under the act or any other law. *Section* 23.

The act is not applicable to banking institutions, savings banks, federal savings and loan associations or any "insurance company or other financial institution * * * subject to any other law of this State or the United States" regarding mortgage loan transactions by such institutions. *Section* 31.

We have already mentioned *section* 29, which declares that no obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless negotiated and made in full compliance with the provisions of the act.

Other unmentioned provisions of the act are not implicated in the issues here raised.

Pursuant to his rule-making power under *section* 30 of the act, the Commissioner of Banking and Insurance has promulgated a set of rules, two of which are involved in this litigation. The first is Rule 1, reading:

> "Notwithstanding the place of execution, nominal or real, of a secondary mortgage loan, if the real property is located in this State, said secondary mortgage loan will be deemed to be subject to the Secondary Mortgage Loan Act of 1965 * * *."

The second is Rule 5(d), under which the lender is required to notify the borrower in writing that he has the right to the advice of counsel of his own choosing before signing the loan papers.

III. The Instant Transaction

Most of the pertinent facts are undisputed; the parties disagree as to others. We propose to decide this appeal on certain of the material facts which are palpably free of any genuine issue and suffice as a matter of law to dictate judgment for defendants. Certain of the undisputed facts have already been related. Some of the assertions as to disputed facts will be mentioned as enlightening background.

Defendant Anthony E. Stefanelli made two affidavits in resistance to plaintiff's motion for summary judgment, alleging the following. Prior to June 6, 1966 (when he made the loan) he was "contacted by a brokerage firm in South Jersey who asked [him] whether [he] needed a loan as [he] had accumulated some debts which [he] wanted to consolidate. Shortly thereafter [he] was contacted by Rodney Radhill, of 1401 Reed Street, Philadelphia, who informed [him] that he would be able to procure the money for [him]." On June 6 Radhill took him to plaintiff's office where he executed several papers, including a mortgage on his home. However, it was not stated before or during the transaction that this involved a mortgage, and defendant did not "believe" this was a mortgage transaction at any time. After he received the net proceeds of the loan ($937.34; this was the balance after payment during closing by lender of certain of defendant's prior obligations in addition to prepaid interest and other charges on the loan; see *infra*), Radhill cashed the check and retained $350 thereof as the price of a small portable television set he "sold" defendants, explaining he was not allowed to charge a brokerage commission for a loan. Only after he received, at a later

date, a statement of the loan, did Stefanelli realize he had executed a mortgage on his home. Stefanelli further asserted in his affidavit that he was "compelled" to purchase creditor life insurance and creditor accident-health insurance, the premiums therefor having been "incurred" over his objections.

Plaintiff's sole evidential showing on the motion as to Radhill's part in the transaction is an affidavit of its manager that "Plaintiff does not have and never had an agent by the name of Rodney A. Radhill and plaintiff made no requirement for defendants to purchase anything from anyone in order to obtain the loan." However, plaintiff failed to answer responsively an interrogatory requesting it to state who was present at the loan closing.

There is no dispute that defendants did on June 6, 1966 at the Philadelphia office of plaintiff sign and deliver to it a promissory note in the amount of $4,535.28 payable in 36 monthly installments of $125.98 each, beginning July 6, 1966, and also a second mortgage on their Newark home as collateral security for the note. The note contained a power of attorney for entry of judgment thereon. It is conceded there were deductions from the face amount of the note of $1,020.43 for interest, $15 for service charge, creditor life insurance and creditor accident and health premiums of $102.05 and $145.13, respectively, and recording and releasing fees of $6.25. The amount of allowable interest under *section* 21 of the New Jersey act would have been some $758. Plaintiff says it did not "compel" defendants to buy the insurance. From the loan proceeds plaintiff at the direction of defendants paid their existing debts: $500 to Household Finance Corp.; $500 to Central Finance; and $1,309.08 to Geral-

dine Sica; leaving a balance of $937.34 disbursed to defendants (from which they paid $350 to Radhill for the television set, as noted above).

IV. The Pennsylvania Statute

The subject matter regulated under the Consumer Discount Company Act (cited above) is the business of lending sums of $3,500 or less (whether secured or unsecured) and charging interest and fees which aggregate more than 6% per year on unpaid principal balances. *Tit.* 7, *Purdon's, op. cit.*, §6203. Such business is restricted to Pennsylvania corporations licensed by the Secretary of Banking. *Ibid.* Supervision of licensees is comprehensive and comparable to that provided for by the New Jersey act. The amount of interest chargeable is formulated differently from the New Jersey act. It is fixed at $7.50 per $100 per year when the "contract is repayable" within 36 months; if for a longer term, then at $6 per $100 for the remainder of the term. Such interest is computed on the face amount of the loan (including all permissible charges) for the full term of the contract and deductible in advance notwithstanding provision for installment payments.[3] *Section* 6213, subd. E. By way of comparison with the stated $7.50 rate, the formula set forth in *Section* 21 of the New Jersey act would permit an amount of interest which, if computed on the Pennsylvania basis for the $7.50 rate, would work out to about $5.90 per $100 per annum.

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[3] The amount of the instant loan complied with the $3,500 limitation since the act provides that that limitation may be exceeded by the amount of interest or other charges authorized by the act. *Section* 6213, subd. E.

The Pennsylvania act also allows: service charge up to $15; extension or deferment charges at the rate of 1½% per month on the amount in arrears; actual official recording fees; the premium for insurance *required or obtained*[4] as security for the loan; attorney's fees and court costs in collection of any contract in default.

Plaintiff argues that comparing allowable interest charges under the New Jersey and Pennsylvania statutes is misleading; that the "cost of money" to the borrower should include the supplemental loan charges, which are potentially heavier in New Jersey. However, the comparison of potential cost of money under the respective statutes will not be determinative, in view of our approach to the issues as developed hereinafter.

We approach the legal questions presented for decision.

V. Residence Requirement—Severability

We have no hesitancy in agreeing with the contention of plaintiff that *section* 3 of the act, requiring that holders of at least 50% of the stock of a corporate applicant (as well as any individual applicant) for a license shall have been residents of New Jersey for two years prior to the application, is unconstitutional. The Attorney General accepts that proposition, acceding to a 1966 unreported decision of the Law Division to that effect. Defendants have offered no defense of the provision, and we conceive none. No reasonable relationship whatever has been advanced or is perceived between the objects

[4] Compare *section* 22 (e) of the New Jersey act which provides the borrower shall not be "compelled" to purchase fire, life or title insurance.

of the legislation and the residence requirement for shareholders of a corporate licensee. The act does not require that licensees must be domestic corporations or that any of their officers, agents or managers be residents. *Cf. Osborn* v. *Ozlin*, 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074 (1940); in respect of such requirements a debatable regulatory justification could perhaps be argued. It seems to us highly likely that *section* 3 had no motivation other than to favor New Jersey residents engaged in the consumer lending field as against out-of-staters. We conclude that the requirement of residence for shareholders is void as violative of due process and equal protection. In accord: *Miskell* v. *Termplan Incorporated of Houston*, 381 S. W. 2d 129 (Tex. Civ. App. 1964). There is possibly also implicated the privileges and immunities clause of the United States Constitution, asserted derivatively in this action by plaintiff on behalf of its shareholders. *Cf. Hess* v. *Pawloski*, 274 U. S. 352, 355-356, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

However, defendants and the Attorney General contend that *section* 3 is severable from the remainder of the act, and that plaintiff continues to be barred from recovery on the note, under *section* 29, by virtue of violations in this transaction of other still viable provisions of the statute. We agree.

This enactment has no specific severability clause. But that fact is not determinative of the question, particularly in the light of the general, overall severability clause in R. S. 1:1-10. The governing principle in all cases is whether it can be concluded that the Legislature "designed that the enactment should stand or fall as a unitary whole." *State by McLean* v. *Lanza*, 27 N. J. 516, 527 (1958). It was further there said:

> "[E]ven if there be no such express declaration of separability, an unconstitutional provision in a statute does not affect the validity of a separate article or clause of the enactment, if otherwise valid, unless the two are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other. Where the principal object of the statute is constitutional, and the objectionable provision can be exercised without substantial impairment of the general purpose, the statute is operative except insofar as it may contravene fundamental law. And the question is to be considered in the light of the settled principle that a permissible doubt as to validity is to be resolved in favor of the enactment" (at p. 528).

In particular reference to a regulatory ordinance it has been stated that the ultimate test is whether the ordinance, "stripped of those provisions which are invalid, remains a comprehensive and cohesive regulatory ordinance with appropriate sanctions for its enforcement." *Cranberry Lake Quarry Co.* v. *Johnson*, 95 N. J. Super. 495, 517 (App. Div. 1967), certification denied 50 N. J. 300 (1967). We deem this applicable as well to a regulatory statute.

Applying the indicated criteria, we have no doubt that the statute would have been intended by the Legislature to stand, even with the residence requirement of *section* 3 deleted as void. The legislative background data demonstrates an urgent sense of the necesity in the public interest of close regulation of the operations of the secondary mortgage lending industry to the extent of

their effect upon New Jersey residents. All of the statutory policing regulations and the substantive provisions governing permissible interest rates, other charges and other provisions of loan contracts are left functionally intact and operative notwithstanding invalidation of the shareholder-residence requisite of *section* 3. We therefore hold the statute survives the excision of *section* 3. See *Miskell* v. *Termplan Incorporated of Houston*, *supra*, 381 S. W. 2d, at p. 131.

VI. Conflict of Laws

Plaintiff contends that appropriate choice-of-law principles require the application of Pennsylvania rather than New Jersey law to the question of the validity of this loan; and since the transaction was valid under Pennsylvania law recovery is not to be denied because of transgressions of the New Jersey act. Strong reliance is placed on *section* 346K, "Contracts for the Repayment of Money Lent," as set forth in *Restatement, Conflict of Laws 2d, Tentative Draft No.* 6 (1960). This section was substantially adhered to in the reformulation thereof in the *Proposed Official Draft, Part* II (1968), as §195 thereof, reading:

> "§195. Contracts for the Repayment of Money Lent.
>
> The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with respect to the particular issue, some other state has a more significant relation-

ship to the transaction and the parties, in which event the local law of the other state will be applied."

Comment (b) states that in determining whether there is a state with a more significant relationship to the transaction and to the parties, resort should be had to the principles set forth in *section* 6 (to be found in *Proposed Official Draft, Part* 1 (1967)). *Subsection* (1) thereof, which we think determinative of the instant issue, reads:

"(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

When there is no such directive, various other principles may come into play, including "the relevant policies of the forum." *Subsection* (2) of *section* 6. As we deem *subsection* (1) the guideline which we should follow, not merely because it is embodied in the *Proposed Official Draft* but for the reason that it is inherently sound, we need not explore the alternative contention of defendants that conflicts principles ordinarily applicable will bow where the result would strongly offend a public policy of the forum state or where the preponderance of the significant contacts with the transaction are situate there. See *HIMC Investment Company* v. *Siciliano*, 103 N. J. Super. 27 (Law Div. 1968), where the instant act was held applicable to a transaction entered into in Pennsylvania on the basis of such principles, but where New Jersey contacts were more pronounced than here. See *Kievit* v. *Loyal Protect. Life Ins. Co.*, 34 N. J. 475, 492-493 (1961).

Opinion of the Superior Court of New Jersey, Appellate Division

Defendants contend that *section* 6, *subsection* 1, of the *Restatement, supra*, finds present application in that New Jersey has expressly ordained that the Secondary Mortgage Loan Act should apply to all such loans where the secondary mortgage exacted is on property situate in this State, no matter where the loan contract is executed—in other words, settled the choice of law problem involved. They refer to Rule 1 of the regulations promulgated by the Commissioner of Banking and Insurance, which is to that effect. However, we cannot agree that the Commissioner would have authority under his delegated rule-making power (under *section* 30, to make such rules "as shall be necesary to the establishment and maintenance of a standard of fair, equitable and honest conduct in the transaction of secondary mortgage loans") to promulgate a choice-of-law rule if the statute contained no such provision, express or implied. This is a rule of substantive law, not an administrative implementation of regulatory policies broadly reflected in the language of the statute itself. "The distinction is between the making and the execution of the law." *Abelson's, Inc.* v. *New Jersey State Board of Optometrists*, 5 N. J. 412, 423-424 (1950).

But we do agree with the alternative argument of defendants that the statute, in the light of its avowed objectives, particularly as illuminated by the legislative history, evinces an unmistakable intent that any secondary mortgage loan, as defined in the act, made by a New Jersey resident involving New Jersey realty be subject to the act notwithstanding execution of the loan documents out of the state and in favor of a foreign corporation. One of the primary evils cited in the investigation preceding adoption of the law, as indicated above, was the enticing of needy New Jersey residents to loan companies

in the Philadelphia area. While it is true that the text of the statute does not express any conditions or qualifications of its applicability in terms of the place of making of the loan, the residence of the lender corporation or the borrower, or even the location of the mortgaged property, the manifest purpose of the legislators in enacting, and of the Governor in approving, this statute was to protect New Jersey residents from overreaching mistreatment of them by out-of-state as well as local lenders taking back secondary mortgages on New Jersey residential real property.

Legislative intent can be discerned by background circumstances revealing the evil sought to be remedied and as thus illuminated may be read into the statute by implication with the same effectiveness as though expressly declared therein. *State v. Gill*, 47 N. J. 441, 444 (1966); *Alexander v. N. J. Power & Light Co.*, 21 N. J. 373, 379 (1956).

In the official *comment* (b) to *section* 6 of the *Restatement, Conflict of Laws* 2d (1967), *supra*, the reporter says:

> "b. *Intended range of application of statute.* A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the *intended range* of application of a particular statute. The court should give a local statute the range of applica-

> tion intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid." (Emphasis added.)

We have no difficulty, applying these precepts, in ascertaining the legislative intention in this instance to be as formulated above and thus as settling (subject to constitutional questions) the choice-of-law issue here under discusion by implied legislative fiat.

Plaintiff calls to its aid decisions elsewhere which in varying unrelated contexts, have held loans or other contracts made outside the forum state to be unaffected by local statutes regulating the doing of busines or excess to local courts, frequently on federal constitutional grounds, and it argues the Legislature must be presumed not to have intended an unconstitutional result. But this contention begs the present issue—*i.e.*, the actual intent of the New Jersey Legislature as to the subjection to this law of out-of-state loans to New Jersey borrowers, secured by mortgages on New Jersey lands. We deal with the constitutional problems separately hereinafter.

VII. Equal Protection

Plaintiff asserts that the definition of a secondary mortgage loan in the statute establishes an arbitrary classification among holders of promissory notes, not required by the public policy of the State and consequently depriving plaintiff of the equal protection of the laws

guaranteed by the Fourteenth Amendment. The position is that there is no rational basis for creating for the special treatment of this act, out of the whole category of mortgage lenders, those whose obligation is secured by a secondary mortgage; nor any basis for including mortgages which are only partially the collateral taken for the loan. But we think it obvious that there is. The investigations which preceded adoption of the act revealed that there was a characteristic syndrome pervading the area of transactions infected by the evil sought to be ameliorated. This consisted of the situation of moderately circumstanced persons owning a home or small multi-family dwelling, already heavily encumbered by a first mortgage, and who, being unable to raise money to meet pressing needs from conventional lenders at ordinary interest rates, were compelled to go to high-interest and premium-exacting lenders who typically tightened their security by exacting a secondary mortgage on the borrower's home.

The question is not whether the act dealt with all facets of the evil but whether, in the light of the end sought, it rationally dealt with any distinct phase of it calling for attention and differentiable on a reasonable basis from any others. *David* v. *Vesta Co.*, 45 N. J. 301, 314-317 (1965), and cases cited therein. In view of the background data, and mindful of the heavy presumption of constitutionality of legislation, we are satisfied that the legislative classifictaion here impugned is valid.

VIII. Due process and Interstate Commerce

Plaintiff and *amicus curiae* lay major emphasis on the argument that application of the act to the instant trans-

action creates an undue burden on interstate commerce, in violation of the commerce clause of the United States Constitution. It is also argued that applying the act to loans made outside the state denies due process. It will be convenient to consider these positions together, as the pertinent considerations intermesh.

The complexity of the problems an the infinite variety of factual and policy considerations presented in the whole area of transactions having multi-state aspects has produced much confusion and many divided and inconsistent rulings in the courts, state and federal, over the validity of the efforts of states to regulate local aspects of interstate transactions. "The question as to what is the proper dividing line between the respective powers of Congress and those of the states to regulate commerce has been declared to be the most perplexing and confusing topic in American constitutional law." 15 *C. J. S. Commerce* §5, *p.* 388. That the powers of Congress in regulation of interstate commerce, when exercised, are paramount to and preemptive of those of the states, is elementary. *Id.*, §6, *p.* 390. Of more tenuous substance is the rubric that even as to areas not entered by Congress state regultaion of the subjects of interstate commerce must not "interfere" with or place "undue burdens" upon such commerce. *Id.*, §10, pp. 403-404.

The matter was succinctly stated in *Neeld* v. *Giroux*, 24 N. J. 224 (1957) (involving stoppage of interstate cargo of cigarettes to investigate possible violation of the New Jersey cigarette tax law):

> "A state may protect its local interest by reasonable measures which do not unduly interfere with

> interstate commerce, in the absence of federal legislation occupying the area" (at p. 228).

And, in upholding legislation regulating the price of milk moving in interstate commerce, the court said, in *National Dairy Products Corp.* v. *Hoffman*, 40 N. J. 475 (1963):

> "* * * [T]he problem is not whether such [interstate] commerce is interfered with but whether the proved interference constitutes an undue or excessive burden on that commerce. Incidental interference or indirect burdens, which find their source and justification in a reasonable exercise of the police power of a state affected by the transaction, are not transgressive of the United States Constitution, in the absence of some controlling or superseding federal enactment or regulation. Regulation of the price of milk was directed by the Legislature to meet the requirement of local conditions and to protect the public interest from what it found to be the adverse effects of those conditions" (at p. 488).

There can hardly be any question that, *prima facie*, state regulation of consumer loan practices deleteriously affecting substantial numbers of the citizenry is a fit and proper exercise of local police power notwithstanding any incidental effect on interstate commerce. See *Metropolitan Finance Corp.* v. *Matthews*, 265 Wis. 275, 61 N. W. 2d 502 (Sup. Ct. 1953), sustaining state licensing procedures for collection agencies in application to an out-of-state firm doing essentially interstate commerce, where the court quoted the following highly instructive language of the Supreme Court in *United States* v. *South-Eastern Underwriters Asso.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944):

"It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather *whether, in each case, the competing demands of the state and national interests involved can be accommodated*" (at p. 548, 64 S. Ct., at p. 1171, emphasis added).

Similarly, in *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944), Mr. Justice Frankfurter wrote:

"Whatever may be the generalities to which these cases give utterance and about which there has been * * * relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances" (at p. 211, 64 S. Ct., at p. 973).

These, we think, are the approaches which should guide us here. New Jersey's strong interest in protecting its citizens from victimization by lenders operating on the

other bank of the Delaware, pursuing their activities through cooperative relations with brokers (whether or not technically agents or independent contractors) who effectively negotiate with the borrowers in this State, should outweigh any incidental effect upon the interstate aspects of the transaction, and save the local legislative remedy for the existing abuses from invalidation under either the commerce or due process clauses.[5]

A significant modern decision relevant to this discussion is *Robertson* v. *People of State of California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946). Involved was the validity of a state statute requiring any insurance agent, broker or solicitor to obtain a state license, in its application to one soliciting for a foreign insurance company not admitted to do business in the state. The court treated the regulation as one of a series stated in the statute to be "designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship" (at p. 447, 66 S. Ct., at p. 1164). In sustaining the validity of the statute whether the agent's acts were regarded as "in" commerce or only as "affecting" it (at p. 448, 66 S. Ct. 1160), the court cited previous Supreme Court decisions sustaining, in the absence of contrary action by Congress, the licensing of agents or brokers for the sale of interstate transportation in order to

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[5] It of course does not matter that in this particular transaction the loan terms may not have been as egregious as the generality of the practices which led to enactment of the statute. If the act applies, and is valid, it must be given even-handed effect in all cases within its coverage.

prevent fraud; trainmen engaged in interstate commerce, to secure their competence; the sale on commission of interstate consignments of farm produce to secure honest dealing and financial responsibility; and the activities of custom brokers to secure responsibility in the state courts on claims arising locally. *Ibid.*

It would seem that in comparison with the instances just stated, the instant situation is, *a fortiori*, free from constitutional interdiction on commerce grounds. Indeed, in other phases of its arguments plaintiff contends that this transaction was wholly an intrastate Pennsylvania transaction.

The closest indication available as to how the United States Supreme Court would react to the commerce argument in a case such as this is afforded by the court's dismissal of the appeal in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965), "for want of a substantial federal question." The appeal there was from a judgment of the California District Court of Appeal and denial of hearing thereon by the Supreme Court of that state, opinion reported in *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1965).

In that case the state Attorney General sought an injunction against the conduct by defendant, a Kentucky corporation, of its small loan business in California without securing a license required by the California statute regulating that type of business. Defendant operated entirely by mail between its home office in Kentucky and borrowers resident in other states, maintaining no employees or offices in California—in other words, a straight interstate

business. The California court rejected the argument of defendant, based upon the commerce clause, and buttressed by citation of the so-called "drummer" cases, *e.g.*, *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678 (1910); but see *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U. S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288 (1961); that the state could not exact a license requirement from a foreign corporation doing purely interstate business with residents of that state. The court noted that the Small Loan Law of California "is legislation designed for the public welfare. It is primarily to protect the citizens of this state from fraudulent and unconscionable conduct of those in the lending business * * * and as such, is a matter of local concern * * *. The degree of regulation contained in the laws of this state with reference to loan sharks is not disproportionate to the evils which exist if the lenders are left to their own devices without licensing and without any regulation by the state" (47 Cal. Rptr., at p. 814); and "Fairfax should not be allowed to escape state regulation merely because it is also engaged in interstate commerce" (*id.*, at p. 815). Proper regulation of the business was thought to be impossible without the license requirement: *Ibid.*

Plaintiff and *amicus curiae* present us with an extended attack upon the soundness of the California opinion in *Fairfax Family Fund* but fail to deal with the tangible fact that the United States Supreme Court dismissed the loan company's appeal therefrom for want of a substantial federal question. A clue to the reasoning behind the short *per curiam* of the Supreme Court lies in the more extended discussion in the dissenting opinion of Mr. Justice Douglas. That emphasizes the "drummer" cases as representative of the there asserted view that "our decisions have

heretofore precluded a State from exacting a license of a firm doing an exclusively interstate business as a condition of entry into the State" (382 U. S., at p. 2, 86 S. Ct., at p. 34). The dissent also suggests the reliance of the appellee (and presumably of the court majority) on *Robertson v. People of State of California, supra*, 328 U. S. 440, 66 S. Ct. 1160, which we have shown above to have manifested a liberal and sympathetic view of state efforts at essential regulation of local incidents of interstate business as against criticism for interference with interstate commerce. In sum, we cannot but construe the dismissal in *Fairfax Family Fund* as strongly suggestive of the validity, in the context of a state statute regulating consumers' loan practices, of New Jersey's exaction from plaintiff of its qualification for a license, as well as of the application to it of the other regulatory provisions in The Secondary Mortgage Loan Act of 1963, insofar as commerce grounds are concerned.

The act is even-handed and non-discriminatory (after excision of *section* 3) in its application to all domestic and foreign corporations engaging in loan transactions within the statutory scope, as interpreted above. By reasonable construction of the act, necessitated by the due process clause, plaintiff need not give up its general office in Philadelphia but must maintain a branch office in New Jersey and there maintain records of its transactions involving secondary mortgages on New Jersey realty for inspection by the Commissioner. In this and the other regulations of the statute mentioned in the briefs there is no invidious discrimination against plaintiff either as a foreign corporation or as engaging in interstate commerce.

Opinion of the Superior Court of New Jersey, Appellate Division

In view of the fact that the cases teach us that each species of business must be appraised separately in the light of its own local regulatory requirements and of the nature of its peculiar interstate ramifications, and having the benefit of the dismissal in *Fairfax Family Fund*, we need not tarry long in dealing with the other commerce cases cited by plaintiff and *amicus curiae*. These have to do with altogether different situations. They cite *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897), which invalidated a Louisiana statute which penalized the entry by domestic corporations into agreements calling for execution out of the state of insurance contracts covering property in the state with companies not in compliance with the insurance laws of the state. First, the fact situation presented there was totally dissimilar from that here. Second, the decision has subsequently been questioned and confined in its application. See *Osborne v. Ozlin; supra*, 310 U. S., at p. 66, 60 S. Ct. 758, 84 L. Ed. 1074; *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 318-319, 63 S. Ct. 602, 87 L. Ed. 777 (1943); *cf. Howell v. Rosecliff Realty Co., Inc.*, 52 N. J. 313, at 322-323 (1968) (sustaining local taxation of premiums on insurance written out of the state on property situated here).

Plaintiff also relies on a series of cases holding that a state may not require of a foreign corporation its taking steps to qualify to do business there as a condition of its right to sue there (generally, or on a contract made there) if it does no business in that state except of an exclusively interstate nature. See, typically, *International Text-Book Co. v. Pigg, supra*. But some of the cases in that field have exhibited considerable readiness to find the local

requirement valid where there was some semblance of local contacts by the foreign corporation apart from its purely interstate business. See *Union Brokerage Co.* v. *Jensen and Eli Lilly & Co.* v. *Sav-On-Drugs*, both *supra*. It is apparent that entirely different local policy questions and regulatory problems are posed in the instant case, and that the sanctions imposed also vary markedly from those in the foreign corporation-registration cases cited. Furthermore, there were here local contacts of importance which preceded and survived the loan transaction itself. There was a mortgage recorded in New Jersey on land situate therein and ordinarily enforceable only by legal action there. Payments on the loan were to emanate from a borrower-resident in that state, exerting an effect on its economy, and, if excessive, possibly on its public resources. *Cf. Howell* v. *Rosecliff Realty Co., Inc., supra*, 52 N. J., at p. 327. And finally, plaintiff's penetration of the New Jersey borrowing market was, in this case, as rendered indisputable by the affidavits, accomplished through the intermediation of a broker operating here. For purposes of the preceding observations, it makes no difference whether or not that broker was, technically, an employee of plaintiff. *Cf. Howell* v. *Rosecliff Realty Co., Inc., supra*, at 326, 327.

In any event, as noted above, the dismissal for lack of a substantial federal question in the *Fairfax Family Fund* case, *supra*, in the face of the *International Text-Book* line of decisions just discussed and relied upon in the dissent in *Fairfax Family Fund*, establishes to our satisfaction that that line of authority does not require a holding here of unconstitutionality on commerce grounds.

In the light of the foregoing discussion, we also find entirely insubstantial the due process argument so far as it rests, as presented, on the circumstance that the loan documents were executed out of the State.

IX. Full Faith and Credit

Finally, plaintiff contends that refusal to apply Pennsylvania law to this transaction would violate the full faith and credit clause of the Constitution. We determined in VI, above, that the Legislature has, by clear implication, decreed that the Secondary Mortgage Loan Act of 1965 should apply to a loan transaction with these incidents whatever its freedom from violation of any law of the state where the papers were signed. But plaintiff says that for the New Jersey Legislature to so ordain violates the full faith and credit clause. We think well settled principles augur a contrary conclusion.

It is clear that the full faith and credit clause does not require a forum state to enforce a contract valid under nonforum law where enforcement would subvert the public policy of the forum state. See *Bradford Electrical Light Co., Inc.* v. *Clapper*, 286 U. S. 145, 160, 52 S. Ct. 571, 76 L. Ed. 1026 (1932); *Klaxon Company* v. *Stentor Electric Manufacturing Company*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Alaska Packers Ass'n.* v. *Industrial Accident Comm.*, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935).

In the instant case, giving this transaction the protective umbrella of the Pennsylvania statute would not only offend New Jersey policy in a most sensitive area, but would negate a New Jersey statute embodying that policy, in terms read above by this court to control the very

transaction involved. In *Casteel* v. *Casteel*, 45 N. J. Super. 338 (App. Div. 1957), we spoke to the issue as follows:

> "Every state is entitled to enforce in its own courts the policy of its own statutes on subjects properly the incidents of its jurisdiction, and the full faith and credit clause of the United States Constitution does not require otherwise unless the conflicting statute or judgment of another state is shown, on some rational basis, to have a superior basis for recognition. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, 547, 548, 55 S. Ct. 518, 79 L. Ed. 1044 (1935)" (at p. 354).

The Pennsylvania statute does not have a claim for recognition to validate this transaction superior to that of the New Jersey statute for subjection of the transaction to its requirements. The freedom of plaintiff ordinarily to contract how and with whom it will does not rationally outweigh the decree of the New Jersey Legislature, born of the baneful background circumstances related above, that whoever, wheresoever resident, would lend to residents of New Jersey on the security of a secondary mortgage on property in that State must comply with the regulatory requisites it has laid down at peril of losing its right of recovery on such a loan in New Jersey courts.

We find the contention grounded on denial of full faith and credit to lack merit.[6]

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[6] Having disposed of the particular constitutional challenges raised herein, we note that the act has also recently been held free from invalidity on grounds of vagueness in various particulars. *Crescent Investments Co.* v. *Commissioner of Banking and Insurance*, 103 N. J. Super. 11 (Ch. Div. 1968).

X. Cancellation of the Mortgage

Pending argument of the appeal, plaintiff, on June 7, 1968, caused the mortgage it took from defendants to be cancelled and discharged of record, and we have granted its motion to add the evidence of that fact to the record. Plaintiff's position is that the discharge of the mortgage relieves the transaction of any coverage by the act. This contention is akin to one of the main grounds on which it prevailed below—that the note and mortgage are separate and distinct and that in an action on the note alone, as here, the taking of the mortgage and any legal incidents thereof are irrelevant to plaintiff's right of recovery thereon.

Both of the stated points miss the policy objective of the act. This was to *prevent the taking* of secondary mortgages on residences as security for a loan unless preceded and accompanied by compliance with the statutory regulations, and this for reasons sufficiently explained hereinabove. The legislative policy is prophylactic as well as curative. Only by the application of the stringent sanctions set forth in the act did the Legislature conceive that *entry into* such unauthorized transactions could be adequately deterred. To allow a lender to get by with the exaction of a secondary mortgage as security for a loan violative of the act, and to defeat the application of sanctions, when challenged, by *then* cancelling the mortgage, would be to defeat the effectiveness of the sanction as a deterrent.

XI. Violations Calling for Sanctions

Section 29 of the act reads:

> "No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the provisions of this act."

Defendants' position is that they were entitled to summary judgment under section 29 on the ground of a number of asserted violations of the act, some of which were the subject of factual dispute on the cross-motions for summary judgment and others not.

The asserted violations involving disputed issues of fact were:

(a) fraud and misrepresentation as to any mortgage being involved in the transaction; (b) being compelled to purchase insurance; (c) exaction by plaintiff's agent of an unauthorized brokerage fee through the enforced purchase of a television set.

If the case for plaintiff's violation of the act depended upon any of the foregoing, the matter would have to be remanded for trial of the factual issues. In view of our conclusion as to the effect of some of the undisputed violations, this will be unnecessary.[7]

The asserted undisputed failure to obtain a license; violations of the Act itself are: (a) the plaintiff's; (b)

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[7] Ground (a), depends on whether the sanction of nonenforcement can be applied to a statutory ground for suspension or revocation of a license under *section* 11, such as commission of any fraud, engaging in any dishonest activities or misrepresentation, as distinguished from any absolutely prohibited act. We need not decide the question.

exaction of excessive interest; (c) inclusion in the note of a power of attorney to confess judgment.

Defendants also project violation by plaintiff of the Commissioner's regulation 5(d), requiring the lender to give the borrower notice in writing of his right to independent counsel before signing the papers. There is no dispute that no such notice was given. As to this contention, however, we seriously doubt that a sanction as heavy as preclusion of the right to sue to recover any part of the loan is applicable to violation of a regulation of the Commissioner as distinguished from violation of the act. The pertinent section (29) speaks only in terms of failure of "compliance with the provisions of this act." Elsewhere in the statute, by contrast, there is reference to violation of "this act or any rules or regulations promulgated pursuant thereto." *Section* 14. See also *section* 11(c).

Nor could we, in the circumstances here presented, forfeit plaintiff's entire chose in action for failure to have obtained a license. Under *section* 3 it would have been futile for plaintiff to have applied for a license, as it did not qualify thereunder. To date there has been no *reported* decision at all, declaring the section invalid. It would be grossly unfair, therefore, to penalize plaintiff by depriving it of its right of action on the note on this ground. However, all "persons" (as defined in the act, *section* 1(*b*)) engaging in transactions covered by the act henceforth are herewith put on notice that the licensing provisions as well as all other valid provisions of the act and regulations are applicable to them.

The remaining undisputed violations of the act—taking of excessive interest and incorporating in the note

a power of attorney to confess judgment—will necessarily require the sanction of *section* 29 to be imposed. The fact that plaintiff did not act on the power of attorney to confess judgment is of no more consequence than its voluntary cancellation of the mortgage, and for the same reasons as stated above in that regard. The note may therefore not be the subject of an action to recover thereon in the courts of this State.

The judgment is reversed and the cause remanded for entry of final judgment in favor of defendants.

Opinion of Superior Court of New Jersey, Law Division, Essex County

Oxford Consumer Discount Company of North Philadelphia v. Stefanelli (Judgment filed November 3, 1967)

Plaintiff is a Pennsylvania Corporation, a licensed consumer discount company in that state. The defendant is a resident of New Jersey.

From the affidavits the following facts appear:

The defendants went to Philadelphia, Pennsylvania, and there entered into a loan transaction with the plaintiff. The defendant on June 6, 1966 at Philadelphia, Pennsylvania, entered into a loan transaction with the plaintiff at which time he executed a promissory note for $4,555.28 and executed in Pennsylvania a second mortgage on property located in New Jersey to secure the note. The entire transaction was executed in Pennsylvania and in accordance with Pennsylvania law.

Defendant contends he did not know this was a secondary mortgage transaction, that he was led to the plaintiff's place of business by Sidney Padhill to whom he paid a brokerage fee by the purchase of a T.V. set.

Plaintiff and defendant now move for summary judgments.

In an action on a promissory note, secured by a mortgage on property located in New Jersey the law of Pennsylvania determines the validity of the note. *Buzzone v. Hartford Accident and Indem. Co.*, 23 N. J. 447 (1957) p. 452.

The New Jersey Secondary Mortgage Loan Act of 1965 has no application to plaintiff's suit on the note.

Opinion of Superior Court of New Jersey; Law Division, Essex County

Plaintiff's motion for summary judgment on the note in the sum of $5,071.82 is granted.

A judgment recovered upon a debt secured by a mortgage does not merge with the mortgage nor operate as a discharge, abandon or release of the mortgage security. *Silver* v. *Williams*, 79 N. J. Super. 456, 462 (Ch. Div. 1961).

The law of New Jersey controlls the validity of the mortgage but does not in any way affect the plaintiff's right to execute on defendant's real estate to satisfy the judgment herein granted.

Defendant's motion for summary judgment is denied.

Plaintiff's attorney will submit appropriate order consented to as to form by defendant's attorney.

The New Jersey Secondary Mortgage Loan Act of 1965. L. 1965; c. 91, §1 *et seq.* N.J.S.A. 17:11A-1 *et seq.*

* * *

17:11A-1. Definitions

In this act, unless the context otherwise requires, the following words shall have the following meanings:

a. "Secondary mortgage loan" means (1) a loan made to an individual or partnership not to be repaid in 90 days or less which is secured in whole or in part by a mortgage upon any interest in real property used as a dwelling with accommodations for not more than 4 families, which property is subject to the lien of one or more prior mortgages or (2) the purchase of any interest in an existing mortgage made to secure such a loan.

b. "Person" means an individual, corporation, partnership or any other group of individuals however organized, but does not include any banking institution, savings bank, association subject to chapter 144 of the laws of 1963,[1] Federal savings and loan association, insurance company or any other financial institution which is subject to any other law of this State or of the United States regulating the power of such institution to engage in mortgage loan transactions.

c. "Licensee" means any person duly licensed by the commissioner pursuant to this act.

d. "Commissioner" means the Commissioner of Banking and Insurance of New Jersey.

e. "Payment period" means the period of time scheduled by the terms of a secondary mortgage loan to elapse

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[1] Section 17:12B-1 et seq.

between the days upon which installment payments are required to be made on such loan.

f. "Net proceeds" means the difference between the full amount of a secondary mortgage loan and the amount of interest taken in advance upon such loan pursuant to this act. L. 1965, c. 91, § 1.

17:11A-2. NECESSITY FOR LICENSE

No person shall make or negotiate, or offer to make or negotiate, any secondary mortgage loan in the regular course of business unless he or his broker, agent or other representative shall have first obtained a license from the commissioner as provided for by this act. A person shall not be deemed to be acting in the regular course of business if he makes or negotiates not more than 2 secondary mortgage loans in a calendar year. L. 1965, c. 91, § 2.

17:11A-3. RESIDENCE REQUIREMENTS

Every applicant for a license under this act shall have been a bona fide resident of this State for a period of at least 2 years prior to the date of filing the application for such license. In the case of a corporate applicant, the holder or holders of at least 50% of the stock of such corporation shall have resided in this State for a period of at least 2 years prior to the date of filing the application. L. 1965, c. 91, § 3.

17:11A-4. APPLICATION FOR LICENSE; FORM; CONTENTS

(a) Application for a license under this act shall be in writing, under oath, and shall be in the form prescribed by the commissioner.

(b) The application shall state the name and residence and business addresses of the applicant, and if the applicant is a copartnership or association, of every member thereof, and if a corporation, of each officer, director and stockholder thereof. It shall also state the address where the business is to be conducted and any other information the commissioner may require. L. 1965, c. 91, § 4.

17:11A-5. Action by commissioner on application.

Within 60 days after the filing of the application and the payment of the fees hereinafter set forth the commissioner shall either:

(a) Issue and deliver to the applicant a license to engage in the business of making or negotiating secondary mortgage loans in accordance with the provisions of this act at the location specified in the said application; or

(b) Refuse to issue the license for any reason for which the commissioner may suspend, revoke or refuse to renew any license under section 11 of this act.[1] L. 1965, c. 91, § 5.

17:11A-6. Duties of commissioner upon denial of license.

If the commissioner refuses to issue a license he shall:

(a) Notify the applicant of the denial and of his right to request a hearing within 10 days.

(b) If the applicant does not request a hearing, return the sum paid as a license fee.

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[1] Section 17:11A-11.

The New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

(c) If the applicant requests such a hearing, give notice of the grounds for refusal and hold a hearing thereon. Within 30 days thereafter the commissioner shall file a written decision containing his findings and conclusions and serve a copy thereof upon the applicant. L. 1965, c. 91, § 6.

17:11A-7. LICENSE; NAME AND LOCATION; TRANSFERABILITY

(a) Each license shall specify the location of the office or branch and must be conspicuously displayed therein. In case such location be changed, the commissioner shall indorse the change of location on the license without charge.

(b) Such license shall not be transferable or assignable.

(c) No licensee shall transact the business provided for by this act under any other name or maintain an office at any other location than that designated in the license. L. 1965, c. 91 § 7.

17:11A-8. LICENSE FEE; RENEWAL

Every licensee shall pay to the commissioner at the time of making the application and annually thereafter upon renewal a license fee of $25.00. L. 1965, c. 91, § 8.

17:11A-9. BOND; FORM; CONDITIONS; LIABILITY

Every licensee shall file with the commissioner a corporate surety bond in the principal sum of $5,000.00. Such bond shall be in form satisfactory to the commissioner and shall be issued by a surety company authorized to transact business in this State. The bond shall run to the State and shall be conditioned that the licensee will

comply with the provisions of this act. The aggregate liability of the surety on the bond shall in no event exceed the amount of such bond. L. 1965, c. 91, § 9.

17:11A-10. ABATEMENT IN AMOUNT OF LICENSE FEE; EXPIRATION OF LICENSE

No abatement in the amount of said license fee shall be made if the license is issued for less than 1 year, nor if the license is surrendered, canceled or revoked prior to the expiration of the period for which such license was issued. Every license shall expire on December 31 of each year. L. 1965, c. 91, § 10.

17:11A-11. SUSPENSION, REVOCATION OR REFUSAL TO RENEW LICENSE; NOTICE; HEARING; FINDINGS BY COMMISSIONER

The commissioner may suspend, revoke or refuse to renew any license issued hereunder, upon 10 days' notice in writing, forwarded by registered or certified mail to the principal place of business of such licensee, stating the contemplated action and in general the grounds therefor, and after reasonable opportunity to be heard, if he shall find that the licensee or any owner, director, officer, member, partner, stockholder, employee or agent of such licensee has:

(a) made any material misstatement in the application;

(b) committed any fraud, engaged in any dishonest activities, or misrepresented or failed to disclose any of the material particulars of any secondary mortgage loan transaction to any one entitled to such information;

(c) violated any of the provisions of this act or of any rule or regulation promulgated pursuant thereto;

(d) otherwise demonstrated unworthiness, bad faith, dishonesty or any other quality indicating that the business of the licensee has not been or will not be conducted honestly, fairly, equitably and efficiently within the purposes and intent of this act. L. 1965, c. 91 § 11.

17:11A-12. Surrender of license; effect upon liability

Any licensee may surrender his license by delivering the license to the commissioner with written notice that he thereby surrenders the license, but such surrender shall not affect the licensee's civil or criminal liability for acts committed prior to the surrender. L. 1965, c. 91, § 12.

17:11A-13. Reinstatement of suspended license; issuance of new license after revocation

Every license issued hereunder shall remain in force and effect until the same shall have expired or been surrendered, revoked or suspended in accordance with the provisions of this act, but the commissioner may reinstate suspended licenses or issue new licenses to a licensee whose license or licenses have been revoked, if the conditions under which such licenses were revoked have been corrected and the commissioner is satisfied as the result of an investigation that such conditions are not likely to recur. L. 1965, c. 91, § 13.

17:11A-14. Investigations by commissioner; examination of books, records and accounts

The commissioner, if he has reasonable cause to believe that any licensee, or any other person, has violated any

of the provisions of this act or of any rules or regulations promulgated pursuant thereto, shall have the power to make such investigations as it shall deem necessary, and may examine the books, accounts, records and files of such licensee or any other such person believed to have violated this act or any rules or regulations promulgated pursuant thereto. L. 1965, c. 91, § 14.

17:11A-15. Issuance of subpoenas; administration of oaths and affirmations by commissioner

The commissioner shall have power to issue subpoenas to compel the attendance of witnesses and the production of documents, papers, books, records and other evidence before him in any matter over which he has jurisdiction, control or supervision. The commissioner shall have the power to administer oaths and affirmations to any person whose testimony is required. L. 1965, c. 91, § 15.

17:11A-16. Failure to comply with subpoena; court order; contempt

In case of a failure of any person to comply with any subpoena issued by the commissioner or to testify with respect to any matter concerning which he may be lawfully interrogated, the Superior Court, on application of the commissioner, may issue an order requiring the attendance of such person and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court as for contempt. L. 1965, c. 91, § 16.

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17:11A-17. MAINTENANCE OF BOOKS, RECORDS AND ACCOUNTS

Every licensee shall maintain at its place or places of business in this State such books, accounts and records relating to all transactions within this act as will enable the commissioner to enforce full compliance with the provisions of this act. L. 1965, c. 91, § 17.

17:11A-18. PRESERVATION OF BOOKS, RECORDS AND ACCOUNTS

All books, accounts and records of the licensee shall be preserved and kept available as provided herein for such period of time as the commissioner may by regulation require. L. 1965, c. 91, § 18.

17:11A-19. INFORMATION REQUIRED TO BE SHOWN IN BOOKS, RECORDS AND ACCOUNTS

The commissioner is hereby authorized to prescribe the minimum information to be shown in such books, accounts and records of the licensee so that such records will enable the commissioner to determine compliance with the provisions of this act. L. 1965, c. 91, § 19.

17:11A-20. COMPLIANCE OF LOAN WITH TERMS AND CONDITIONS OF ACT

No licensee shall make or offer to make any secondary mortgage loan except on the terms and conditions authorized by this act. L. 1965, c. 91, § 20.

17:11A-21. AMOUNT OF LOAN

A licensee may make a secondary mortgage loan in such an amount that the net proceeds thereof shall equal a predetermined sum, and may take interest in advance

upon the full amount of such loan for the period from the making of the loan to the date of maturity of the final installment. The full amount of such loan shall not exceed the aggregate of net proceeds and the amount of interest which may be taken in advance, as determined by the application of the formula,

$$\frac{I = .14\ A\ (P+1)}{2N}$$

in which "I" represents the amount of interest which may be taken in advance; "A" represents the amount of the predetermined net proceeds; "P" represents the number of payment periods contained in the period from the date of the making of the loan to and including the date of maturity of the final installment; and "N" represents, to the nearest whole number, the number of payment periods contained in a calendar year. L. 1965, c. 91, § 21.

17:11A-22. SCHEDULE OF MAXIMUM CHARGES

(a) The following is hereby fixed as the schedule of maximum amounts which may be charged to an applicant for a secondary mortgage loan for costs, fees, services, points and premiums which may be incurred by such applicant in connection with a secondary mortgage loan:

1. Appraisal and inspection fee of $50.00 per parcel or tract of land to be mortgaged.

2. Credit investigation of borrower—$15.00.

3. Search fee of $50.00 per parcel or tract of land to be mortgaged.

The New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

4. Legal fees, including preparation of all documents—5% of the full amount of the mortgage loan, not to exceed the sum of $250.00.

5. Recording and filing fees not to exceed $5.00 per document.

(b) The borrowers shall not be required to pay and commissions, finder's fees or points for the obtaining, procuring or placing of a secondary mortgage loan and such commissions, finder's fees or points, if any, shall be paid by the licensee and only to licensed real estate brokers, attorneys at law of the State of New Jersey or licensees under this act. Any agreement for the payment of such commissions, finder's fees or points, to be enforceable in the courts of this State, shall be in writing, signed by the licensee.

(c) The borrower shall not be compelled to purchase from the licensee fire, life or title insurance policies in connection with a secondary mortgage loan. L. 1965, c. 91, § 22.

17:11A-23. Prohibited provisions

No instrument evidencing or securing a secondary mortgage loan shall contain:

(a) any acceleration clause under which any part or all of the unpaid balance of the obligation not yet matured may be declared due and payable because the holder deems himself to be insecure;

(b) any power of attorney to confess judgment or any other power of attorney;

(c) any provision whereby the debtor waives any rights accruing to him under the provisions of this act or of any other law;

(d) any requirement that more than one installment be payable in any one installment period, or that the amount of any installment be greater or less than that of any other installment, except for the final installment which may be in a lesser amount;

(e) any assignment of or order for the payment of any salary, wages, commissions, or other compensation for services, or any part thereof, earned or to be earned. L. 1965, c. 91, § 23.

17:11A-24. Statement of borrower's account

Upon written request from the borrower the holder of a secondary mortgage loan instrument shall deliver to the borrower within 10 days from a receipt of the written request a statement of the borrower's account showing the date and amount of all payments made or credited to the account and the total unpaid balance. Not more than 2 such statements shall be required in any 12 month period. L. 1965, c. 91, § 24.

17:11A-25. Payment before maturity; refund credit

Any borrower may satisfy in full at any time before maturity the amount of any balance due on any secondary mortgage obligation, and in so satisfying any such debt shall receive a refund credit on account of the interest in advance. L. 1965, c. 91, § 25.

The New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-26. Refusal of existing mortgage holders to make loan

No licensee shall make or negotiate any secondary mortgage loan unless it shall appear, from satisfactory evidence furnished by the applicant, that the holder of every existing mortgage upon the property offered as security for the secondary mortgage loan, other than the licensee, has declined to make a loan in the desired amount on the security of another mortgage upon such property. L. 1965, c. 91, § 26.

17:11-27. False or misleading advertising

It shall be unlawful for any person to cause to be placed before the public in this State, directly or indirectly, any false or misleading advertising matter pertaining to secondary mortgage loans or the availability thereof; provided, however, that this section shall not apply to the owner, publisher, operator or employees of any publication or radio or television station which disseminates such advertising matter without knowledge of the false or misleading character thereof. L. 1965, c. 91, § 27.

17:11A-28. Violations; penalties

Any person who shall knowingly violate any provision of this act or shall directly or indirectly counsel, aid or abet such violation shall be liable, in addition to all other penalties and forfeitures imposed by this act or by any other law, to a penalty of not more than $1,000.00 for each offense.

Such penalty shall be sued for and recovered by and in the name of the commissioner and shall be collected

and enforced by summary proceedings pursuant to the Penalty Enforcement Law (N.J.S. 2A:58-1 et seq.). L. 1965, c. 91, § 28.

17:11A-29. Enforceability of loans in state courts

No obligation arising out of a secondary mortgage loan shall be enforceable in the courts of this State unless such loan was negotiated and made in full compliance with the provisions of this act. L. 1965, c. 91, § 29.

17:11A-30. Rules and regulations

The commissioner is hereby authorized and empowered to make, alter, amend and repeal such rules and regulations as shall be necessary to the establishment and maintenance of a standard of fair, equitable and honest conduct in the transaction of secondary mortgage loans. L. 1965, c. 91, § 30.

17:11A-31. Effect of act upon existing financial institutions

Nothing contained in this act shall be deemed to have any effect whatever upon the existing powers of any banking institution, savings bank, association subject to the provisions of chapter 144 of the laws of 1963,[1] Federal savings and loan association, or insurance company or other financial institution which is subject to any other law of this State or the United States regulating the power of such institution to engage in mortgage loan transactions, or upon the conditions and limitations imposed by any such law upon the exercise of such powers. L. 1965, c. 91, § 31.

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[1] Section 17:12B-1 et seq.

The New Jersey Secondary Mortgage Loan Act of 1965. N.J.S.A. 17:11A-1 et seq.

17:11A-32. SHORT TITLE

This act shall be known and may be cited as "The Secondary Mortgage Loan Act of 1965." L. 1965, c. 91, § 32.

17:11A-33. EFFECTIVE DATE

This act shall take effect on the ninetieth day next following the enactment thereof and shall be applicable to all secondary mortgage loans which have been entered into or made on or after said date. L. 1965, c. 91, § 33.

Regulations Promulgated by the New Jersey Commissioner of Banking and Insurance Relating to the New Jersey Secondary Mortgage Loan Act of 1965

1. Section 1A

Notwithstanding the place of execution, nominal or real, of a secondary mortgage loan, if the real property is located in this State, said secondary mortgage loan will be deemed to be subject to The Secondary Mortgage Loan Act of 1965 and all other laws of the State of New Jersey.

2. Section 18

Every licensee shall preserve the books, accounts and records for at least 2 years after making the final entry on any secondary mortgage loan.

3. Section 19

a. Every licensee shall file with the Commissioner a blank copy of every form used in the conduct of its secondary mortgage loan business. Should any such form be changed, an amended copy shall be filed with the Commissioner immediately.

b. At the time a secondary mortgage loan is made the licensee shall deliver a closing statement to the borrower setting forth the net proceeds of the loan, itemized fees incurred or disbursed, interest charge, full amount of the loan and the terms by which the loan is to be repaid.

c. The borrower shall be given a copy of every paper he is called upon to sign.

d. Every licensee shall maintain an individual record or ledger card for each secondary mortgage loan, which shall include the following information:

Regulations Promulgated by the New Jersey Commissioner of Banking and Insurance Relating to the New Jersey Secondary Mortgage Loan Act of 1965

1. Account number.
2. Name and address of borrower (mortgagor).
3. Address and physical description of mortgaged property.
4. Date of loan.
5. Amount of loan.
6. Appraisal or inspection fee.
7. Credit investigation fee.
8. Search fee.
9. Legal fees.
10. Recording and filing fees.
11. Insurance premiums and types of coverage.
12. Interest charge.
13. Full amount of the secondary mortgage loan.
14. The terms by which the loan is to be repaid.
15. Amount and to whom any commissions, finder's fees or points, if any, were paid by the licensee and the form of disbursement (cash—check).
16. Record of the computation of any rebate upon prepayment of a loan in full before maturity.
17. Record of the computation of any refund of unearned insurance premium charge upon prepayment of a loan in full before maturity.

Regulations Promulgated by the New Jersey Commissioner of Banking and Insurance Relating to the New Jersey Secondary Mortgage Loan Act of 1965

18. Name and address of any subsequent holder of a secondary loan obligation if it is sold, assigned, negotiated or transferred.

4. SECTION 21

a. The full amount of a secondary mortgage loan shall not exceed the aggregate of the net proceeds and the amount of interest which may be taken in advance, as determined by the application of the following formula:

$$I = \frac{.14\ A\ (P + 1)}{2\ N}$$

I=interest which may be taken in advance

A=amount of predetermined net proceeds

P=number of payment periods contained in the period from the date of the making of the loan to and including the date of maturity of the final installment

N=number of payment periods, to the nearest whole number, contained in a calendar year

The following examples demonstrate the method of computing the interest on secondary mortgage loans:

1. Loan of $1,000 for 1 year, repayable in 12 monthly installments of $89.66 each:

$$\frac{.14 \times \$1{,}000 \times (12 + 1)}{2 \times 12} = \frac{1{,}820}{24} = \$75.83 \text{ (interest)}$$

$\$1{,}075.83 \div 12 = \$89.65+$ (monthly installment)

2. Loan of $3,500 for 5 years, repayable in 60 monthly installments of $79.10 each:

$$\frac{.14 \times \$3{,}500 \times (60 + 1)}{2 \times 12} = \frac{29{,}890}{24} = \$1{,}245.42 \text{ (interest)}$$

$\$4{,}745.42 \div 60 = \$79.09+$ (monthly installment)

b. Interest tables made available by various financial publishers may be used by a licensee in ascertaining the interest charge and monthly payment; however, the accuracy of such tables shall be the responsibility of the licensee.

c. In addition to the interest and fees provided for in sections 21 and 22 of the act, no further or other charge for any examination, service, brokerage, commission, late charges, attorney fees, expense, fee, or bonus or other thing or otherwise shall be directly or indirectly charged, contracted for, or received by anyone, except on actual sale of the security in foreclosure proceedings or upon the entry of judgment. This, however, shall not include subsequent disbursements of the licensee, such as bank collection fees which are actually paid by the licensee, foreclosure costs, and reasonable legal fees actually paid and incidental thereto.

5. Section 22

a. If a secondary mortgage loan transaction is not consummated because the licensee refuses to proceed, except as provided in 5b of this regulation, the licensee shall return any fees received from the borrower except that

the licensee shall be reimbursed for any expenses incurred up to the maximums set out in section 22 of the act, but in no event shall the total fees reimbursed exceed $50.00.

b. If a secondary mortgage loan transaction is not consummated because the borrower refuses to proceed or has given false information, the licensee shall be reimbursed for all expenses incurred, not to exceed those set forth in section 22 of the act.

c. If for any reason a secondary mortgage loan transaction is not consummated, a licensee shall return all documents executed by or belonging to the borrower.

d. Every borrower shall have the right to be represented by an attorney of his own choosing in closing a secondary mortgage loan and shall be advised of such right, in writing, prior to the execution of the secondary mortgage loan.

6. Section 22(c)

When a licensee requires fire or life insurance in connection with a secondary mortgage loan, such insurance shall be written by or through, a duly licensed insurance agent or broker of the State of New Jersey, with an insurance company authorized to do business in this State.

No licensee shall require, as a condition to obtaining a secondary mortgage loan, a borrower to negotiate for or obtain a policy of insurance or renewal thereof, covering the property involved in the transaction, from or

through a particularly designated insurance agent or broker.

7. SECTION 25

a. Any borrower may satisfy in full at any time before maturity the amount of any balance to become due on any secondary mortgage obligation, and in so satisfying any such debt shall receive a refund credit of that portion of the precomputed interest by the rule commonly known as the "Rule of 78ths," which shall be calculated as follows:

> The amount of such refund shall represent at least as great a proportion of the interest charge as the sum of the installment payment balances scheduled by the secondary mortgage loan obligation to follow the installment date after the date of prepayment bears to the sum of all the installment payment balances under the schedule of payments in the secondary mortgage loan obligation.

Where the amount of the refund credit for anticipation of payments is less than $1.00, no refund need be made.

b. Notwithstanding the provisions of a secondary mortgage loan to the contrary, no borrower shall be required to pay a penalty fee for prepaying a secondary mortgage loan in full prior to maturity.

c. Every licensee shall, upon prepayment of a secondary mortgage loan in full, return all documents executed or belonging to the borrower within 20 days. It shall be the further duty of a licensee to notify the borrower that

it is the responsibility of the borrower to cancel of record any document on file with a county clerk.

8. Section 26

For the purpose of compliance with section 26 of the act, satisfactory evidence to be furnished by the applicant shall mean an affidavit, signed by the applicant, that the holder of every existing mortgage upon the property offered as security for the secondary mortgage loan, other than the licensee, has declined to make a loan in the desired amount on the security of another mortgage upon such property.

9. Section 27

a. In all forms of advertising where the cost of a secondary mortgage loan is referred to, the licensee shall specifically state the rate as 14% simple interest per annum, or publish a table which shows the full amount which the borrower is required to pay, the amount of the net proceeds, and the amount, number and intervals of the required payments.

b. No licensee shall advertise, print, display, publish, broadcast, telecast, any statement or representation which refers to the supervision by the State of New Jersey or the Department of Banking and Insurance.

c. A licensee may advertise that it is licensed under Chapter 91, P.L. 1965, The Secondary Mortgage Loan Act of 1965; provided, however, that for the purpose of raising capital funds no such advertisement shall be permitted if it is to be used in connection with a public solicitation for such funds.

The Pennsylvania Consumer Discount Company Act P.L. 262, §1 *et seq.* 7 Purdon's Statutes §6201 *et seq.*

§ 6201. Short title

This act shall be known, and may be cited, as the "Consumer Discount Company Act." 1937, April 8, P.L. 262, § 1.

§ 6202. Definitions

The following terms shall be construed in the act to have the following meanings, except in those instances where the context clearly indicates otherwise:

"Person" includes an individual, partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any other group of individuals however organized.

"Contract" means a promissory or judgment note, bill of exchange, judgment, mortgage, conditional sales, contract, lease or bailment by which the lessee or bailee has the option of becoming or is bound to become the owner of real or personal property upon full compliance with the terms of the agreement, or any other form of negotiable or nonnegotiable instrument evidencing an agreement to pay a sum certain in money at a fixed or determinable time, either by a single payment or by stated installments.

"Applicant" means a corporation applying for a license under the provisions of this act.

"Licensee" means a corporation holding a license issued under the provisions of this act, which license has not been cancelled, surrendered or revoked and has not expired.

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"Consumer" means the person who is the maker on a note, or the acceptor of a bill of exchange, or the defendant on a judgment, or the mortgagor on a mortgage, or the lessee on a lease, or the bailee on a bailment, or the purchaser on a conditional sales contract, or the person or persons obligated to pay any other negotiable instrument defined as a "contract" under this act.

"Charges" means and includes all interest or discount and the service charge which a licensee is authorized to collect by the provisions of this act.

"Default" means failure to pay a contract when due or failure to pay any stated installment when due. 1937, April 8, P.L. 262, § 2; 1947, June 20, P.L. 665, § 1.

§ 6203. License required

A. On and after the effective date of this act, no person, partnership, association, foreign business corporation organized under or by virtue of any laws other than those of this Commonwealth, nonprofit corporation, common law trust, joint-stock company, or any other group of individuals however organized, shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money or credit, in the amount or value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced or on the unpaid principal balances when the contract is payable by stated installments.

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B. On and after the effective date of this act, no domestic business corporation organized under or existing by virtue of the Business Corporation Law of this Commonwealth, and no director, officer, employe, agent or member of such corporation, shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money or credit, in the amount or value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments, without first obtaining a license from the Secretary of Banking of the Commonwealth of Pennsylvania in accordance with the provisions of this act. 1937, April 8, P.L. 262, § 3; 1947, June 20, P.L. 665; § 1; 1963, July 30, P.L. 335, § 1.

§ 6204. Application for license

The application for such license shall be in writing, under oath and in the form prescribed by the Secretary of Banking. The application shall contain the corporate title of the applicant, which shall include the words "Consumer Discount Company"; the street and number, if any, office building and roof number, if any, city, borough, township or municipality, and county where the business is to be conducted; date of incorporation; name and residence address of all directors; and such other information as the Secretary of Banking may require.

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A separate application on the prescribed form shall be filed for each place of business conducted by a licensee. 1937, April 8, P.L. 262, § 4.

§ 6205. LICENSE BOND

A bond in the penal sum of five thousand dollars ($5000) shall accompany every application for license. Such bond shall be executed by a surety company authorized by the laws of Pennsylvania to transact business within this Commonwealth. The bond shall be renewed and refiled annually not later than June first for the first three consecutive years from the date on which the licensee was first licensed. The bond shall be executed to the Commonwealth of Pennsylvania and shall be for the use of the Commonwealth and for any person or persons who may have a cause of action against the licensee. The condition of the bond shall be that the licensee will comply with and abide by all the provisions of this act and all the rules and regulations of the Secretary of Banking, lawfully issued in accordance with this act and that the licensee will pay to the Commonwealth, to the Secretary of Banking, or to any person or persons, and any and all monies that may come due to the Commonwealth, to the Secretary of Banking, or to any person or persons, from the said licensee under and by virtue of the provisions of this act. If any person shall be aggrieved by the misconduct of a licensee and shall recover judgment against such licensee, such person may, on any execution issued under such judgment, maintain an action upon the bond of the licensee in any court having jurisdiction of the amount claimed, provided the Secretary of Banking assents thereto.

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A separate bond shall be provided for each place of business conducted by a licensee. After the licensee has been continuously licensed for three (3) consecutive years, such bond shall not be renewed or refiled unless the Secretary of Banking has reason to believe that such bond is necessary and notifies the licensee in writing on or before May 1 that such bond is required. 1937, April 8, P.L. 262, § 5; 1963, July 30, P.L. 335, § 2.

§ 6206. LICENSE FEE

A license fee of one hundred dollars ($100) shall accompany each application for license under this act. Each license shall remain in full force and effect until surrendered, revoked or suspended as herein provided. The licensee fee of one hundred dollars ($100) shall be paid annually on or before June first. No abatement of the said license fee shall be made if the license is issued for less than one year. An additional license fee of one hundred dollars ($100) shall be paid for each place of business conducted by a licensee.

All license fees and fines received by the Secretary of Banking under this act shall be deposited in the State Treasury to the credit of the Banking Department Fund for the use of the Secretary of Banking in administering this act. 1937, April 8, P.L. 262, § 6; 1963, July 30, P.L. 335, § 2.

§ 6207. ORGANIZATION; MINIMUM CAPITAL

A license under the provisions of this act shall be issued only to a corporation organized under the Business Corporation Law of the Commonwealth of Pennsylvania. Such corporation shall be incorporated with a minimum

capitalization of twenty-five thousand dollars ($25,000). At the time of applying for a license under this act, the minimum subscribed capital shall be twenty-five thousand dollars ($25,000), and the minimum paid in capital shall be ten thousand dollars ($10,000). The minimum subscribed capital of twenty-five thousand dollars ($25,000) shall be fully paid in within one year of the date of issuance of the license. 1937, April 8, P.L. 262, § 7.

§ 6208. Issuance of license

The Secretary of Banking, if he approves the application for license, shall issue to each applicant a certificate showing the name of the corporation and address of the place of business. Such license shall be posted in a conspicuous place in the office of the licensee so that it will be in full view of the public at all times. A license may not be transferred or assigned. A licensee may, with the approval of the Secretary of Banking, change his place of business to another location within the same municipality. A licensee desiring to change his place of business shall give written notice thereof to the Secretary of Banking and return the license certificate to the Secretary of Banking for amendment. The Secretary of Banking, if he approves the removal of the place of business, shall endorse on the license his approval of the change of address and the date thereof, which shall thereafter be the authority for the operation of such business under such license at the new location. No change in the place of business of a licensee to a location outside the original municipality shall be permitted: Provided, however, a licensee may obtain a new license for a place of business in a new location in a municipality other than that in which the original place of business

was located. Only one place of business may be operated under the same license.

A licensee may operate more than one place of business by obtaining a separate license by filing an application for each additional place of business, and by furnishing a bond for each additional place of business and by paying the license fee provided in this act for each additional place of business. 1937, April 8, P.L. 262, § 8.

§ 6209. Records required

Licensees operating under the provisions of this act shall maintain adequate and complete records of all business transacted, containing such information and in such form as shall be prescribed by the Secretary of Banking by general rule or regulation. The records of licenses shall be maintained in the English language. The records of licensees shall be retained for a period of two years after the date of final payment on any contract. 1937, April 8, P.L. 262, § 9.

§ 6210. Reports to the Secretary of Banking

Licensees operating under the provisions of this act shall annually, on or before the first day of March, file a report with the Secretary of Banking, giving such relevant information concerning the business and operations during the previous calendar year as the Secretary of Banking may require. Such report shall be made under oath and shall be in the form prescribed by the Secretary of Banking. A separate report shall be filed for each place of business maintained by a licensee. The Secretary of Banking may at any time upon thirty (30) days notice require a licensee to file special reports in

addition to the annual report. For failure to file such reports within the time specified, the licensee shall pay to the Secretary of Banking a penalty of ten dollars ($10) for each calendar day which such report is overdue, but the Secretary of Banking may, in his direction, relieve a licensee of any portion or of all such fine. Such fine, which has not been paid by the licensee and for the payment of which the licensee has not been relieved, may be collected by the Secretary of Banking from the bonding company which has executed the bond required under this act, and the Secretary of Banking may maintain an action for the recovery of such fine in any court of competent jurisdiction. 1937, April 8, P.L. 262, § 10.

§ 6211. Examinations by the Secretary of Banking

The Secretary of Banking, and any person designated by him for that purpose, may at any time investigate the business and affairs and examine the books, accounts, papers, records, documents, and files therein of every licensee and of every person who shall be engaged in business contemplated by this act, whether such person shall act or claim to act as principal, agent or broker, or under or without the authority of this act. For this purpose the Secretary of Banking shall have free access to the offices and places of business, books, accounts, papers, records, documents, files, safes and vaults of all such persons. A person, who is not licensed under this act, shall be presumed to be engaged in business contemplated by this act if he advertises or solicits business as principal, agent or brower for which a license is required by the provisions of this act, and the Secretary of Banking, and any person designated by him for that purpose, is in such cases authorized to examine the books, accounts, papers,

records, documents, files, safes and vaults of such persons for the purpose of discovering violations of this act.

The cost of every examination of the business of a licensee by the Secretary of Banking, or his duly authorized representative, shall be paid by the licensee so examined, and the Secretary of Banking may collect such costs from the licensee or from the surety company which has executed the bond required under this act, and he may maintain an action for the recovery of such costs in any court of competent jurisdiction. 1937, April 8, P.L. 262, § 11.

§ 6212. Authority of the Secretary of Banking.

The Secretary of Banking shall have the power to reject any application for license if he is satisfied that the financial responsibility, experience, character and general fitness of the person or persons shown on the application for license as officers and directors of the applicant corporation are not such as to command the confidence of the community and to warrant the conclusion that the business will be operated honestly, fairly, and within the intent and purpose of this act and in accordance with the general laws of this Commonwealth: Provided, however, That no license may be issued, if any director, officer, employe, or agent of the applicant corporation has been convicted under this act for engaging in business contemplated by this act without having obtained a license under this act, or if any director, officer, employe, or agent of the applicant corporation was a director, officer, employe, or agent of a corporation which had been convicted of a second offense violation of this act

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and had its license revoked. Whenever the Secretary of Banking rejects an application for a license, he shall furnish the applicant with a written specification of the reason or reasons therefor. Any corporation whose application for a license is rejected by the Secretary of Banking may, within thirty (30) days of notice thereof, appeal from such action to the Court of Common Pleas of Dauphin County. The failure of the Secretary of Banking to act upon an application within three (3) months of receipt thereof shall be deemed to be an approval of such application.

The Secretary of Banking, upon thirty (30) days' written notice to the licensee, forwarded by registered mail to the place of business of such licensee, as shown on the application for license, stating the contemplated action and in general the grounds therefor, may revoke any license if the licensee shall violate any provision of this act; or if the licensee shall violate any rule or regulation issued by the Secretary of Banking under and within the authority of this act; or if a licensee shall fail to comply with any demand, rule or regulation, lawfully made by the Secretary of Banking under and within the authority of this act; or if the licensee shall refuse to permit the Secretary of Banking, or his designated representative, to make examinations authorized by this act; or if the licensee shall fail to pay the cost of examination by the Secretary of Banking, or his duly authorized representative; or if the licensee has failed to maintain in effect the bond required under the provisions of this act; or if the licensee has failed to maintain records prescribed by the Secretary of Banking; or if the licensee has failed to file the annual report to

the Secretary of Banking within the time stipulated in this act; or if the licensee, having failed to file the annual report within the stipulated time, has not paid the fine required under this act; or if any fact or condition exists or is discovered, which, if it had existed or had been discovered at the time of filing of the application for such license, would have warranted the Secretary of Banking in refusing to issue such license. Whenever the Secretary of Banking has issued a notice of intention to revoke a license, the licensee may within the period of thirty (30) days provided in the notice, appeal from such action to the courts of Dauphin County. Whenever such license is revoked, the Secretary of Banking shall not issue another license to the licensee until the expiration of at least one year from the date of revocation of said license and not at all if such licensee, or any officer, director, employe or agent thereof, shall have been convicted for a second offense violation of this act.

The Secretary of Banking is hereby authorized and empowered to issue rules and regulations governing the records to be maintained by licensees, the statements of contract to be given consumers, the receipts for payment of contracts to be given consumers, the foreclosure and replevin of real or personal property upon default, and the procedure for sale of real or personal property upon default, and he is further authorized and empowered to issue such general rules and regulations as may be necessary for the protection of the public, for insuring the proper conduct of the business contemplated by this act, and for the enforcement of this act, which rules and regulations shall have the force and effect of law.

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The Secretary of Banking shall be authorized to require the attendance and testimony of witnesses and the production of any books, accounts, papers, records, documents, and files relating to such business which the Secretary of Banking has authority by this act to investigate, and, for this purpose, the Secretary of Banking may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence. In case of disobedience of any subpoena or the contumacy of any witness appearing before the Secretary of Banking, the Secretary of Banking may invoke the aid of the courts of Dauphin County or any court of the Commonwealth, and such court shall thereupon issue an order requiring the person subpoenaed to obey the subpoena or to give evidence or to produce books, accounts, papers, records, documents, and files relative to the matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof. 1937, April 8, P.L. 262, § 12; 1947, June 20, P.L. 665, § 1; 1959, Dec. 17, P.L. 1890, § 1.

§ 6213. Powers conferred on licensees

In addition to the general powers conferred upon a corporation by the Business Corporation Law of this Commonwealth, a corporation licensed under this act shall have power and authority:

A. To lend money, credit, goods or things in action and charge, contract for, receive or collect charges herein provided.

B. To lend money on the security of real or personal property or without security.

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C. To lend money on promissory or judgment notes with or without comakers, endorsers, guarantors or sureties.

D. To purchase contracts evidencing an agreement to pay a sum certain in money or credit at a fixed or determinable time.

E. To charge, contract for, receive or collect interest or discount at a rate not to exceed seven dollars and fifty cents ($7.50) per one hundred dollars ($100) per year when the contract is repayable within thirty-six (36) months from the date of making. When the contract is repayable more than thirty-six (36) months from the date of making, the rate of interest or discount which may be charged, contracted for, received or collected, shall not exceed seven dollars and fifty cents ($7.50) per one hundred dollars ($100) per year for the first thirty-six (36) months of the term of the contract plus six dollars ($6) per one hundred dollars ($100) per year for any remainder of the term of the contract. Such interest or discount shall be computed at the time the loan is made on the face amount of the contract for the full term of the contract from the date of the contract to the date of the scheduled maturity notwithstanding any requirement for installment payments. On contracts for periods which are less or greater than one year, or which are not a multiple of one year, the interest or discount shall be computed proportionately on even calendar months: Provided, however, That for a period of less than one month the computation may be based on a full calendar month. The face amount of any note or contract made pursuant to this act may, notwithstanding

any other provision, exceed three thousand five hundred dollars ($3,500) by the amount of interest or discount and service or other charge authorized by this act collected or deducted in advance or added to the principal at the time of making the loan.

F. To charge, contract for, receive or collect on any contract a service charge of one dollar ($1.00) for each fifty dollars ($50), or fraction thereof, provided that the total service charge shall not exceed fifteen dollars ($15) on any contract.

G. To charge, contract for, or collect for interest or discount, and service charge a minimum charge of three dollars ($3.00) on any contract of twenty five dollars ($25) or less, which is payable in one year by a single payment, or is payable in one year, by installment payments and a minimum charge of six dollars ($6.00) on any contract in excess of twenty five dollars ($25) which is payable in one year by a single payment, or is payable in one year by installment payments. On contracts for periods which are less or greater than one year, a proportionate minimum charge may be collected which shall be computed on even calendar months: Provided, however, That for a period less than one month the computation of the minimum charge may be based on a full calendar month.

H. To collect or deduct interest or discount and service charges in advance; or to add interest or discount and service charges to the principal amount of the contract and divide the total into equal or substantially equal installment payments; or to collect interest or dis-

count and service charges wholly or partially at any time during the term of the contract; or to collect interest or discount and service charges at the end of the term of the contract.

J. To require payment of contracts in equal weekly, semi-monthly, monthly or any other periodic installments.

K. To collect an additional charge for extension, deferment or default in the payment of any contract or for extension, deferment or default in the payment of any installment on a contract at the rate of one and one-half per cent (1½%) per month on the amount extended, deferred or in arrears: Provided, however, A minimum charge of twenty-five cents ($.25) may be collected for any extension, deferment or default.

L. To renew or refinance contracts. On a contract which is renewed or refinanced prior to the expiration of the term of the contract, a refund shall be made of unearned interest or discount which has been prepaid and shall be computed as on a prepaid contract.

M. To collect from the consumer, in addition to the interest or discount and service charges permitted under this act, the actual fees charged by a public official or agency of the Commonwealth for recording and satisfying a judgment, mortgage, encumbrance or lien on any real or personal property which constitutes security on a contract.

N. To collect from the consumer, in addition to the interest or discount and service charges permitted under this act, the premium actually paid for insurance

required or obtained as security for, or by reason of, a loan made or contract purchased, provided insurance is obtained from an insurance company authorized by the laws of Pennsylvania to conduct business in this Commonwealth. Any benefit or return to the licensee from the sale or provision of such insurance shall not be deemed a violation of this act when the insurance is written pursuant to the laws of this Commonwealth governing insurance.

P. To collect attorney's fees and court costs incurred in the collection of any contract in default and to collect actual and reasonable expenses of repossessing, storing and selling collateral, pledged as security on any contract in default. 1937, April 8, P.L. 262, § 13; 1947, June 20, P.L. 665, § 1; 1963, July 30, P.L. 335, § 3.

§ 6214. LICENSE REQUIREMENTS AND LIMITATIONS

A. A licensee shall not permit any person to become obligated to such licensee as a consumer on one or more loan contracts for an aggregate amount in excess of three thousand five hundred dollars ($3,500), exclusive of charges authorized by this act. A husband and wife for the purposes of this limitation shall be construed as one consumer. This limitation shall not apply to the purchase of contracts which arise from the bona fide sale of goods or services by a seller regularly engaged in the sale of such goods or services. This limitation shall not impair the authority of a license to lend money, credit goods or things in action, or to purchase contracts in amounts in excess of three thousand five hundred dollars ($3,500) and charge, contract for, receive or collect interest or dis-

count at the legal rate established by the General Usury Statute of the Commonwealth.

B. A licensee shall not charge, contract for, collect or receive interest, discounts, fees, fines, commissions, charges or other considerations in excess of the interest or discount, service charges, extension charges, deferment charges, default charges, recording and satisfaction fees, premiums for insurance, attorney's fees, court costs, repossession expenses, storage charges, and selling expenses authorized by the provisions of this act.

C. A licensee shall not split or divide any contract so as to obtain charges in excess of those authorized by this act.

D. A licensee shall permit a consumer to pay partially or wholly any contract or any installment on a contract, prior to the due date. On any contract which is wholly prepaid by cash, renewal or otherwise, at any time prior to maturity, the licensee shall refund to the consumer a portion of the interest or discount. The portion to be refunded shall be that proportion of the interest or discount which the sum of the monthly balances originally scheduled to be outstanding during the full months following such prepayment in full bears to the sum of all monthly balances originally scheduled to be outstanding, both sums to be determined by the schedule of payments in the original contract, provided a licensee shall not be required to refund any portion of such interest or discount when the total amount of the refund computed as herein provided is less than twenty-five cents ($.25). Such refund shall be computed and paid or credited at the time of prepayment on the contract.

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E. A licensee shall not charge, contract for, receive or collect the service charge authorized by this act when only the unpaid balance of an existing contract is renewed or refinanced prior to the expiration of four (4) months from the date of such existing contract: Provided, however, That when an existing contract is renewed or refinanced for an amount in excess of the unpaid balance of such existing contract prior to the expiration of four (4) months from the date of such existing contract, the service charge may be charged on the amount, whereby the amount of the renewed or refinanced contract exceeds the amount of the unpaid balance of such existing contract, after crediting such balance with any refund of interest or discount which may be due on such existing contract.

F. All installment contracts shall provide for repayment in substantially equal periods and in substantially equal amounts: Provided, That when appropriate for the purpose of facilitating payment in accordance with a consumer's intermittent income, an installment contract may provide for repayment on a schedule which reduces or omits payments over any period or periods in which the consumer's income is reduced or suspended.

G. A licensee shall not charge or collect a service charge for investigating an application or any other charges if a contract is not consummated.

H. A licensee shall not discount or deduct interest in advance on any contract, for any period in excess of four years and fifteen days. 1937, April 8, P.L. 262, § 14; 1947, June 30, P.L. 665, § 1; 1963, July 30, P.L. 335, § 4.

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§ 6215. STATEMENT OF CONTRACT

A licensee shall furnish to the consumer a statement setting forth the type of contract, description of the security on the contract, the date of the contract, the total amount due on the contract, the date upon which the contract is due or the dates upon which the installment payments are payable, the amount of such installment payments, and a statement indicating the basis for computing default charges. No default charges may be collected if the statement of contract does not give due notice of the licensee's intention to collect default charges. This statement of the contract shall contain such additional information as the Secretary of Banking may require. 1937, April 8, P.L. 262, § 15.

§ 6216. RECIEPTS FOR PAYMENT

A licensee shall furnish, at the time of payment of a contract or at the time of payment of any installment on a contract, a receipt setting forth the date of the payment, the amount paid and the amount remaining due and identifying the contract upon which the payment is to apply. If the payment includes charges for default, the receipt shall show the amount of such charges separately. The receipt of payment shall contain such additional information as the Secretary of Banking may require. 1937, April 8, P.L. 262, § 16.

§ 6217. SCOPE OF ACT

This act shall not affect any existing laws, special or general, authorizing a charge for the loan of money in excess of interest at the legal rate. This act shall not

apply to any person, persons, partnership, association or corporation operating under the laws related to banking institutions, building and loan associations, credit unions or licensed under the Small Loans Act, approved June seventeen, one thousand nine hundred fifteen, and supplements or amendments, or licensed by the Secretary of Banking of the Commonwealth of Pennsylvania under the provisions of any other statute. This act shall not apply to any bona fide sale of personal property by a person regularly engaged in the sale of such personal property, wherein the purchaser may pay any part or all of the purchase price in stated installments, nor to any such bona fide sale under a conditional sale contract, lease or bailment, wherein the purchaser, lessee or bailee has the option of becoming, or is bound to become, the owner of the property upon full compliance with the terms of the agreement. This act shall not apply to nonprofit corporations organized under the laws of the Commonwealth of Pennsylvania having memberships consisting exclusively of duly licensed physicians, surgeons and dentists, operated exclusively for and by their members, and engaged in, among other activities, the financing of personal obligations arising from the rendering of professional services by the members of such non-profit corporations, which are limited strictly to medical, surgical, dental, operative, diagnostic and treatment services, or nursing and hospital care. 1937, April 8, P.L. 262, § 17; 1947, May 23, P.L. 296, § 1.

§ 6218. PENALTIES

Any person, partnership, association, foreign business corporation, nonprofit corporation, common law trust, joint-stock company, or any other group of individuals however organized, or any domestic business corporation

which has not obtained a license from the Secretary of Banking of the Commonwealth of Pennsylvania in accordance with the provisions of this act, or any partner, director, officer, employe, agent, or member thereof, who shall engage in the business of negotiating or making loans or advances of money or credit, in the amount or value of three thousand five hundred dollars ($3,500) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges or other considerations which aggregate in excess of six per cent (6%) per year on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments, shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine of not less than five hundred dollars ($500) or more than five thousand dollars ($5,000), and/or suffer imprisonment not less than six (6) months nor more than three (3) years, in the discretion of the court.

A corporation licensed under the provisions of this act or any director, officer, employe or agent who shall violate any provision of this act or shall direct or consent to such violations, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than two thousand dollars ($2,000) for the first offense, and for each subsequent offense a like fine, and/or suffer imprisonment not to exceed one year, in the discretion of the court.

The payment of three thousand five hundred dollars ($3,500) or less, in money, credit, goods or things in action as consideration for any sale or assignment of, or order for, the payment of wages, salary, commissions or other compensation for services, whether earned or to be earned, shall, for the purposes of regulation under

this act, be deemed a loan secured by such assignment, and the amount by which such assigned compensation exceeds the amount of such consideration actually paid shall for the purpose of regulation under this act, be deemed interest or charges upon such loan from the date of such payment to the date such compensation is payable. Such transactions shall be governed by and subject to the provisions of this act.

The payment of three thousand five hundred dollars ($3,500) or less, in money, credit, goods or things in action as consideration for any sale of real or personal property which is made on condition or agreement, expressed or implied, that such property be sold back at a greater price shall, for the purpose of this act, be deemed to be a loan secured by such property, and the amount by which the repurchase price exceeds such original purchase price actually paid shall be deemed interest or charges upon such loan from the date such original payment is made until the date such repurchase price is paid. Such transaction shall be governed by and subject to the provisions of this act.

When real or personal property is pledged as security on a loan of three thousand five hundred dollars ($3,500) or less, and the lender requires the borrower to pay for insurance thereon, such charge for insurance shall be construed as interest under this act when the lender has failed to have such insurance written by an insurance company legally authorized to conduct business in Pennsylvania. When the amount charged for such insurance is in excess of the standard cost of similar insurance in other insurance companies legally authorized to conduct business in Pennsylvania, the excess shall be construed as

interest under this act. 1937, April 8, P.L. 262, § 18; 1947, June 20, P.L. 665, § 1; 1963, July 30, P.L. 335, § 4.

§ 6219. INTERPRETATION OF ACT

The provisions of this act are severable, and if any of its provisions shall be held unconstitutional, the decision of the court shall not affect or impair any of the remaining provisions of this act. It is hereby declared to be the legislative intent that this act would have been adopted had such unconstitutional provisions not been included.

Section headings shall not be taken to govern or limit the scope of the sections of this act. The singular shall include the plural, and the masculine shall include the feminine or neuter. 1937, April 8, P.L. 262, § 19.

as a dwelling, including a dual purpose or combination type dwelling which is also used as a business or commercial establishment, and has accommodations for not more than 4 families, except that a loan which: (1) is to be repaid in 90 days or less; (2) is taken as security for a home repair contract executed in accordance with the provisions of chapter 41, P. L. 1960; (3) is at an interest rate which is not in excess of the usury rate in existence at the time the loan is made, as established in accordance with the law of this State, and on which loan the borrower has not agreed to pay, directly or indirectly, any charge, cost, expense or any fee whatsoever other than said interest; or (4) is the result of the private sale of a dwelling if title to the dwelling is in the name of the seller and the seller has resided in said dwelling for at least one year if the buyer is purchasing said dwelling for his own residence and, as part of the purchase price, executes a secondary mortgage in favor of the seller; shall not be subject to the provisions of this act.

b. "Borrower" means any person applying for a secondary mortgage loan, whether or not the loan is granted, and any person who has actually obtained such a loan.

c. "Licensee" means a person who is required to be licensed by section 3 of this act.

d. "Person" means an individual, association, joint venture, partnership, limited partnership, limited partnership association, corporation or any other group of individuals however organized.

e. "Commissioner" means the Commissioner of Banking [and Insurance]* of New Jersey including his depu-

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*EXPLANATION—Matter enclosed in brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

ties, or any other salaried employee of the Department of Banking [and Insurance] appointed or designated by the commissioner to perform the functions required for the administration or enforcement of this act.

3. No person shall engage in the secondary mortgage loan business in this State unless such person shall first obtain a license under this act. For the purpose of this act, a person is deemed to be engaged in the secondary mortgage loan business in this State if: (a) such person advertises, causes to be advertised, solicits, negotiates, offers to make or makes a secondary mortgage loan in this State, whether directly or by any person acting for his benefit; or (b) such person becomes the subsequent holder of a promissory note or mortgage, indenture or any other similar instrument or document received in connection with a secondary mortgage loan. A real estate broker licensed pursuant to the provisions of the law of this State or an attorney authorized to practice law in this State shall not be required to obtain a license to negotiate a secondary mortgage loan in the normal course of the business of a real estate broker or attorney.

4. a. An application for a secondary mortgage loan license shall be on a form provided by the commissioner. The application shall set forth the name and resident address of the applicant and, if the applicant is other than an individual or corporation, of each partner or member and if the applicant is a corporation, of each officer, director and the registered agent. The application shall also set forth the address or addresses where the secondary mortgage loan business is to be conducted in this State.

b. The application shall demonstrate that the applicant has liquid assets available for the purpose of making secondary mortgage loans and a net worth of at least $50,000.00.

c. The application shall contain such other information as the commissioner shall require in order to carry out the purposes of this act.

d. If the applicant intends to conduct business under a trade name, a certified copy of the applicant's trade name certificate as required by the law of this State shall accompany the application.

e. If the applicant is a foreign corporation, said corporation shall be authorized to do business in this State in accordance with the law of this State regulating corporations.

f. Applicants for a secondary mortgage loan license shall file with the application an irrevocable consent, duly acknowledged, that suits and actions may be commenced against such licensee in the courts of this State by the service of process or any pleading upon the commissioner, in the usual manner provided for service of process and pleadings by the statutes and Court Rules of this State. Said consent shall provide that such service shall be as valid and binding as if service had been made personally upon the licensee in this State. In all cases where process or pleadings are served upon the commissioner pursuant to the provisions of this section, such process or pleadings shall be served in duplicate, one of which shall be filed in the office of the commissioner and the other shall be forwarded by the commissioner, by certified or registered mail, return receipt, to the last known principal place of business of the licensee to whom such process or pleadings is directed.

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5. An applicant shall pay to the commissioner at the time the application is filed, and annually thereafter upon renewal, a license fee of $200.00 for his principal place of business and an additional $50.00 for each branch office in this State.

6. Within 60 days after an application is received, the commissioner shall determine whether a license should be issued. The commissioner may refuse to issue a license for any reason for which he may suspend, revoke or refuse to renew a license as provided for by section 23a of this Act.

7. If the commissioner refuses to issue a license, he shall notify the applicant, in writing, of his denial, the reason therefor and of the applicant's right to request a hearing; provided, however, that no such request shall be binding on the commissioner unless the request is made in writing, within 10 days after receipt of the commissioner's notice. If the applicant requests a hearing, the commissioner shall hold a hearing within 10 days after receipt of the applicant's request, and within 20 days after the hearing he shall render a decision, in writing, which shall set forth his findings and conclusions, a copy of which shall be sent to the applicant. Registered or certified mail, return receipt, shall be utilized by the commissioner to transmit any notice or decision to the applicant, which shall be mailed to the applicant's principal place of business in this State, as set forth in the application. If the applicant does not request a hearing or if, after a hearing, the commissioner still refuses to issue a license to the applicant, the amount paid as a license fee shall be refunded to the applicant but the application and all supplemental schedules, instruments or

documents filed with the application shall remain in the custody of the commissioner.

8. Each license issued by the commissioner shall specify:

a. The name and address of the licensee, the address so specified to be that of the licensee's principal place of business, or branch office, in this State.

b. The licensee's reference number, which may remain the same from year to year despite variations in annual license numbers which may result from the renewal of licenses by mechanical techniques.

c. Such other information as the commissioner shall require in order to carry out the purposes of this act.

9. A license issued by the commissioner shall:

a. Expire on December 31 of each year. No refund in the amount of the license fee shall be made if the license is issued for less than 12 months or if the license is voluntarily surrendered to or suspended or revoked by the commissioner prior to its expiration date.

b. Be invalid, in the event the licensee is a corporation, if the licensee's corporate charter is voided in accordance with the provisions of any law of this or any other State.

10. A license shall not be assignable or transferable by operation of law or otherwise.

11. a. A licensee shall have authority to make a secondary mortgage loan, repayable in installments, and may charge, contract for and receive thereon interest at an annual percentage rate not exceeding 15%, computed by

the actuarial method (United States rule) and; provided further, the Commissioner of Banking [and Insurance], with the advice of a special advisory board constituted as hereinafter provided, may by regulation adopted, amended and rescinded from time to time, provide that the interest which may be taken for any such loan shall be more than 15% per annum but not more than [18%] [*20%*] *18%* per annum, as shall be prescribed in such regulation.

(1) No interest shall be paid, deducted, or received in advance. Interest shall not be compounded and shall be computed only on unpaid principal balances. For the purposes of computing interest, whether at the maximum rate or less, a month shall be considered a calendar month and where a fraction of a month is involved a day shall be considered 1/30 of a month.

b. In making, amending, and rescinding regulations pursuant to the preceding provision, the Commissioner of Banking [and Insurance] and the special advisory board shall consider the general state of the economy, the discount rates prescribed by the Federal Reserve Bank of New York and the Federal Reserve Bank of Philadelphia, the advance rate as prescribed by the Federal Home Loan Bank of New York, the availability of funds for loans, studies and statistics published by the Federal Home Loan Bank Board and other agencies of the United States and of this State, and such other factors and bases for determination as the commissioner and the board may deem pertinent. The rate established by any such regulation shall reasonably reflect prevailing market conditions, regionally and nationally, based upon the studies, statistics and factors considered, and shall remain in force until such time as such regulation is rescinded or such rate is

increased or decreased by a subsequent regulation. Any such regulation shall have prospective effect only.

c. The special advisory board herein provided for shall consist of the Commissioner of Banking [and Insurance], who shall be ex-officio chairman of the board, and 5 members appointed by the Governor with the advice and consent of the Senate. Any appointed member of the board may be removed from office by the Governor whenever, in his judgment, the public interest may so require. Each of the 5 appointed members shall have had, at the time of his appointment, practical experience in consumer financing or fields so related thereto as to qualify each as an authority for the purpose of advising the Commissioner of Banking [and Insurance] regarding the interest which may be taken for any secondary mortgage loan. At no time shall there be more than a single representative on the board from any one institution or group of institutions.

d. Each member of the board shall hold office for a term of 2 years, and thereafter until his successor is appointed and has qualified, subject to removal by the Governor pursuant to the preceding provision. Members of the board shall be eligible for reappointment in the same manner as the initial appointment of members of the board as provided for heretofor. Any vacancies in the board shall be filled for the unexpired portion of the term in the same manner as for a full term.

e. The members of the special advisory board shall serve without compensation, but shall be reimbursed for their actual and necessary expenses in attending meetings of the board. All claims for reimbursement shall be submitted in the form and manner prescribed for like claims of the Commissioner of Banking [and Insurance].

f. The board shall meet at least semiannually, at such times and places in the State as it may determine. The commissioner may call such other meetings as he may deem necessary, and he shall call a meeting when requested by 2 or more members of the board. At least 3 days notice of every meeting shall be given to each member of the board personally, or by mail, telephone, or telegraph. Four members of the board shall constitute a quorum.

g. The special advisory board shall elect a secretary who may be an employee of the Department of Banking [and Insurance] but who shall receive no extra compensation for serving as secretary. The secretary shall keep an accurate record of all meetings of the board and shall perform such other duties as may be prescribed by the board.

h. For the purpose of discharging its duties, the board shall have access to all relevant records in the Department of Banking [and Insurance], including reports and confidential communications, but each member of the board shall treat all information so obtained as confidential and shall not reveal any such information to any person other than another member of the board.

i. No member of the Board, including the Commissioner of Banking [and Insurance], shall be personally liable for any act done or omitted in connection with the performance of his duties under this act.

j. At the initial meeting of the special advisory board, the members shall agree, by majority vote, to the procedure by which recommendations will be made to the commissioner concerning the interest rate to be established pursuant to this act.

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12. A secondary mortgage loan licensee shall:

a. Maintain at least one licensed place of business in this State.

b. Conspicuously display his license at each licensed place of business.

c. Keep on file with the commissioner a corporate surety bond in the principal sum of $5,000.00. Said bond shall be in the form required by the commissioner and shall be issued by a surety company authorized to transact business in this State. The bond shall run to the State and shall be conditioned that the licensee will comply with the provisions of this act. The aggregate liability of the surety on the bond shall in no event exceed the amount of said bond.

d. Maintain a net worth of $50,000.00 at all times.

e. Maintain at his place of business in this State an original or true copy of the following instruments, documents, accounts, books and records:

(1) Promissory note evidencing each borrower's secondary mortgage loan indebtedness.

(2) Mortgage, indenture or any other similar instrument or document which creates a lien on the real property which is taken as security for a secondary mortgage loan.

(3) Credit life and accident and health insurance policy or a certificate of insurance where such insurance is obtained in accordance with section 16 of this act.

(4) Closing statement for each secondary mortgage loan.

(5) Appraisal or search, where utilized.

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(6) Individual ledger card or any other form of record which shows all installment payments made by the borrower and all other charges or credits to the borrower's account.

(7) Individual file in which the borrower's application for a loan and any correspondence, including collection letters, memorandums, notes or any other written information pertaining to the borrower's account, shall be kept.

(8) General ledger, cash receipts and disbursements register, check book, canceled checks and such other accounts, books or records as shall be required by the commissioner in order to ascertain whether the licensee has been conducting his secondary mortgage loan business in full compliance with the provisions of this act.

All of the aforementioned instruments, documents, accounts, books and records shall be kept separate and apart from the records of any other business conducted by the licensee and shall be preserved and kept available for investigation ~~or examination~~ by the commissioner for at least 2 years after a secondary mortgage loan has been paid in full. The provisions of this section shall not apply to any instrument, document, account, book or record which is assigned, sold or transferred to another secondary mortgage loan licensee nor shall the 2-year requirement apply to an instrument or document which must be returned to the borrower at the time a secondary mortgage loan is paid in full.

f. Annually, before February 1, file a report with the commissioner which shall set forth such information as the commissioner shall require concerning the business conducted as a licensee during the preceding calendar year. The report shall be in writing, under oath and on a form provided by the commissioner.

g. Be subject to an examination by the commissioner, at least once a year, at which time the commissioner shall have free access, during regular business hours, to the licensee's place or places of business in this State and to all instruments, documents, accounts, books and records which pertain to the licensee's secondary mortgage loan business. The cost of any such examination shall be borne by the licensee.

h. In the event a borrower's application for a secondary mortgage loan is denied, notify the borrower, in writing, of said denial and, provided further, the name of any such borrower or a list of any such borrowers shall not be referred by the licensee, in any manner whatsoever, to any other lender, retail seller of personal property or services or to any other person, whether in this or any other State.

i. If a secondary mortgage loan is not consummated, return all documents executed by or belonging to the borrower.

j. Give to the borrower, without charge, a copy of every instrument, document or other writing the borrower signs.

k. Give to the borrower, without charge, written evidence of credit life and accident and health insurance, if any, in accordance with regulations promulgated by the commissioner pursuant to chapter 169, P. L. 1958.

l. Give to the borrower, without charge, at the time a secondary mortgage loan is made, a closing statement which itemizes the individual amounts disbursed to or on behalf of the borrower, including, but not limited to, the premium for credit life and accident and health insurance, if any, the total amount of the funds so disbursed, the amount of the interest charge, total amount of the

loan, the amount, number and due date of the installment payments and the interest charge, expressed as an annual percentage rate.

m. When a payment is made in cash on account of a secondary mortgage loan, give to the borrower, without charge, at the time such payment is actually received, a written receipt which shall show the name and address of the licensee, the name and address of the borrower, account number or other identification mark or symbol, date, amount paid and the unpaid balance of the account prior to and after the cash payment.

n. Upon written request from the borrower, give or forward to the borrower, without charge, within 5 days from the date of receipt of such request, a written statement of the borrower's account which shall show the dates and amounts of all installment payments credited to the borrower's account, the dates, amounts and an explanation of all other charges or credits to the account and the unpaid balance thereof. A licensee shall not be required to furnish more than 2 such statements in any 12-month period.

o. When a secondary mortgage loan is paid in full:

(1) Refund to the borrower, in accordance with regulations promulgated by the commissioner pursuant to chapter 169, P. L. 1958, any unearned portion of the premium for credit life and accident and health insurance, if a premium for such insurance was disbursed on behalf of the borrower at the time the secondary mortgage loan was originally made.

(2) Stamp or write on the face of the promissory note evidencing the borrower's secondary mortgage loan indebtedness "Paid in Full" or "Cancelled," the date paid

and the name and address of the licensee and, within 10 days, return the promissory note to the borrower.

(3) Release, at the expense of the licensee, any lien on real property and cancel the same of record and, at the time the promissory note evidencing the borrower's secondary mortgage loan indebtedness is returned; deliver to the borrower such good and sufficient assignments, releases or any other certificate, instrument or document as may be necessary to vest the borrower with complete evidence of title, insofar as the applicable secondary mortgage loan is concerned; to the real property.

13. A secondary mortgage loan licensee shall not:

a. Transact any business subject to the provisions of this act under any other name or at any other location except that designated in his license. For the purpose of this section, the transaction of business includes, but is not limited to, the signing of any instrument, document or any other form by the borrower, except that a borrower's application for a secondary mortgage loan need not be signed in the office of the licensee. A licensee who changes his name or place of business shall immediately notify the commissioner who shall issue a certificate to the licensee, which shall specify the licensee's new name or address.

b. Photocopy or otherwise reproduce his license.

c. Request that a borrower incorporate in connection with a secondary mortgage loan or aid or abet such a scheme.

d. Make a secondary mortgage loan which has been referred by a retail seller, who, in connection with such referral, has required the borrower to purchase personal

property or services or has indicated that such purchase is necessary as a condition precedent for such loan;

e. Charge an application fee or make any other charge or accept an advance deposit prior to the time a secondary mortgage loan is closed.

f. Make a secondary mortgage loan until such time as the licensee has obtained:

(1) A written statement signed by the borrower that the holder of every other existing mortgage on the real property offered as security for the secondary mortgage loan has declined to make a loan in the desired amount or;

(2) A written statement signed by the borrower that the terms offered by the holder of every other existing mortgage on the real property offered as security for the secondary mortgage loan are not acceptable to the borrower.

g. Require or accept from a borrower any collateral or security for a secondary mortgage loan other than a mortgage, indenture or any other similar instrument or document which creates a lien upon any real property.

h. Contract for, charge, receive or collect directly or indirectly, any of the following in connection with a secondary mortgage loan: a charge for appraisal service; search; broker's or finder's fee; commission; discount; expense; examination fee; fine; interest; penalty; points; premium, or any other thing of value other than the charges authorized by this act, except the expenses incurred on actual sale of the real property in foreclosure proceedings or upon the entry of judgment, which are otherwise authorized by law [*; provided, however, a li-*

censee may require a borrower to pay a reasonable legal fee at the time of the execution of the secondary mortgage loan, provided any such legal fee shall represent a charge actually incurred in connection with said secondary mortgage loan and shall not be paid to a person except an attorney authorized to practice law in this State; provided further, that such legal fee shall be evidenced by a statement from such attorney issued to the licensee]; *~~provided, however, a licensee may require a borrower to pay a reasonable legal fee at the time of the execution of the secondary mortgage loan, provided any such legal fee shall represent a charge actually incurred in connection with said secondary mortgage loan and shall not be paid to a person except an attorney authorized to practice law in this State; provided, further, that such legal fee shall be evidenced by a statement from such attorney issued to the licensee.~~*

~~i.~~ Assign, sell or transfer a secondary mortgage loan to a person other than another secondary mortgage loan licensee.

j. Solicit business through any other person by paying, directly or indirectly, for such business referred to the licensee by any such person.

k. Solicit business, directly or indirectly, for any other licensee, lender, retail seller of personal property or services or for any other person, whether in this or any other State.

l. Advertise, cause to be advertised or otherwise solicit whether orally, in writing, by telecast, by broadcast or in any other manner:

(1) That he is licensed by, or that his business is under the supervision of, the State of New Jersey or the Department of Banking [and Insurance], except that a

licensee may advertise that he is "licensed pursuant to the Secondary Mortgage Loan Act"; provided, however, that for the purpose of raising capital, no such advertisement shall be permitted if it is to be used in connection with a public solicitation for such funds.

(2) Any name, address or telephone number other than the licensee's own name, address and telephone number in this State.

(3) The word "bank" ~~or any term~~ inferring that the licensee is or is associated with a bank.

(4) The amount ~~of the~~ interest to be charged, unless ~~such charge is also expressed~~ as an annual percentage rate.

(5) Any statement or representation which is false, misleading or deceptive and, provided further, a written or other visual advertisement shall include the licensee's name, address and telephone number in this State and the phrase "Secondary Mortgage Loans" in 10-point bold type or larger.

14. Every borrower shall have the right to be represented by an attorney of his own choosing at the time a secondary mortgage loan is closed and shall be advised of such right, in writing, at least 4 days prior to the execution of the secondary mortgage loan.

15. A borrower shall not be required to pay, directly or indirectly, to a licensee or any other person, a broker's or finder's fee, commission, discount, points or premium for obtaining, procuring or the placing of a secondary mortgage loan.

Appendix A

16. A borrower shall not be compelled to purchase credit life or accident and health insurance in connection with a secondary mortgage loan. If, however, the borrower elects to obtain such insurance, he shall in a separate instrument, consent thereto, in writing, and, provided further:

a. The insurance shall be obtained in accordance with chapter 169, P. L. 1958, and the regulations promulgated by the commissioner pursuant thereto.

b. For the purpose of this section, the word "debtor" as defined in chapter 169, P. L. 1958, means, if more than one person is obligated for the payment of a secondary mortgage loan, the person whose signature appears on the first line provided for the signatures of borrowers on a promissory note evidencing the borrower's indebtedness, said person to be the only person for whom such insurance is obtained.

c. The premium for any such insurance shall be deducted from the amount of the secondary mortgage loan requested by the borrower.

d. Nothing in this act or in any other law of this State shall prohibit a licensee or any employee, affiliate, subsidiary, or associate of said licensee, from collecting the premium or identifiable charge for insurance permitted by this act and from receiving or retaining any dividend, or any other gain or advantage resulting from such insurance; subject, however, to the authority of the commissioner to promulgate such rules and regulations with regard to such dividend, gain or advantage as he may deem necessary, including the authority to reduce the rate of interest to be charged by a particular licensee to borrowers in consideration of the benefit to said licensee from such dividend, gain or advantage.

Appendix A

17. Notwithstanding any agreement between a licensee and a borrower to the contrary, a borrower shall not be required to pay a penalty fee for prepaying a secondary mortgage loan in full prior to maturity.

18. An instrument evidencing a secondary mortgage loan shall:

a. Be in the form of a promissory note which shall be identifiable by the use of the words "Secondary Mortgage Loan" printed prominently, in 14-point bold type or larger, centered and at the top of the promissory note and, directly underneath, in 8-point bold type or larger, the statement, "This promissory note is subject to the provisions of the Secondary Mortgage Loan Act."

b. Provide for the payment, in full, of the total amount of the secondary mortgage loan in substantially equal payment periods, measured in terms of weeks or months, and installment payment amounts, except that the initial payment period may be deferred for 60 days and, provided further, when appropriate for the purpose of facilitating payment in accordance with the borrower's intermittent income, a promissory note may provide an installment schedule which reduces or omits payments over any period or periods of time during which period or periods the borrower's income is reduced or suspended, and the final installment may be $1.00 more or less than the amount of all other regular installment payments.

c. Contain the following notice printed prominently, in red, in the identical form indicated below, in 10-point bold type or larger, directly above the space provided for the signature of the borrower.

Appendix A

"NOTICE TO BORROWER

Read this promissory note before you sign.

Do not sign this promissory note if it contains blank spaces.

This promissory note is secured by a secondary mortgage on your real property."

d. Be completed in full before it is signed by the borrower. In the event that it is unnecessary to fill in a blank space provided for in any instrument, the figure -0-, a dash, line or the word "none" shall be inserted in such blank space.

19. No writing of any kind executed in connection with a secondary mortgage loan shall contain:

a. An agreement whereby the borrower waives any rights accruing to him under the provisions of this act or any other law of this State.

b. A power of attorney to confess judgment or any other power of attorney.

c. An assignment of or order for the payment of any salary, wages, commissions or any other compensation for services, or any part thereof, earned or to be earned.

d. An agreement to pay any amount other than the unpaid balance of the promissory note or any other charge authorized by this act.

e. A provision relieving the licensee from liability for any claim, or from any legal remedy, which the borrower may have against said licensee under the terms of the promissory note.

Appendix A

f. A provision whereby the borrower waives any right of action against the licensee, a subsequent holder or any person acting on the licensee's or holder's behalf for any illegal act committed in the collection of payments under the promissory note.

g. An acceleration clause under which the unpaid balance of the promissory note not yet matured or any part thereof may be declared due and payable because the licensee or subsequent holder deems himself to be insecure.

20. A promissory note may provide for the payment of attorney fees in the event it becomes necessary to refer the promissory note to an attorney for collection; provided, however, that any such provision shall be void and unenforceable unless:

a. The promissory note is referred to an attorney authorized to practice law in this State.

b. The attorney to whom the promissory note is referred is not a partner, officer, director or employee, whether salaried or commissioned, of the licensee.

c. Suit is actually filed by the attorney to whom the promissory note is referred and subsequently decided in favor of the licensee, in which event such attorney fees shall not exceed 15% of the first $500.00, 10% of the next $500.00 and 5% of any excess amount due and owing under the promissory note and, provided further that at least 15 days prior to the commencement of the suit, the licensee or his attorney shall send to the borrower, by certified or registered mail, return receipt, at his last known address, a statement of his intention to sue, which statement shall also specify the amount of principal, interest and any other charge due and owing to the licensee.

Appendix A

d. In any proceeding to satisfy a judgment by the sale of the real property securing a secondary mortgage loan, a credit for the fair market value of such property shall be afforded to the borrower.

21. The commissioner shall have authority to:

a. Make, enforce, alter, modify, amend, or repeal rules and regulations to effectuate the purposes of this act and to establish and maintain ethical, fair, equitable and honest business standards for persons who are subject to any provision of this act.

b. Examine any instrument, document, account, book, record or file of a licensee or any other person, or make such other investigations as he shall deem necessary to administer the provisions of this act.

c. Conduct administrative hearings on any matter pertaining to this act, issue subpoenas to compel the attendance of witnesses and the production of instruments, documents, accounts, books and records at any such hearing, which may be retained by the commissioner until the completion of all proceedings in connection with which they were produced, and administer oaths and affirmations to any person whose testimony is required. In the event a person fails to comply with a subpoena issued by the commissioner or to testify on any matter concerning which he may be lawfully interrogated, on application by the commissioner, the Superior Court may issue an order requiring the attendance of such person, the production of instruments, documents, accounts, books or records or the giving of testimony.

22. A licensee may surrender his license to the commissioner by delivering his license to the commissioner

with written notice that the license is being voluntarily surrendered but such an action by a licensee shall not affect the licensee's civil or criminal liability for acts committed prior to the date on which the license was surrendered.

23. a. The commissioner may suspend, revoke or refuse to renew any license issued pursuant to this act after giving 10 days written notice forwarded to the licensee's principal place of business, by registered or certified mail, return receipt, stating the contemplated action and the reason therefor, if he shall find, after the licensee has had an opportunity to be heard, that the licensee has:

(1) Made any material misstatement in his application.

(2) Misrepresented, deceived, concealed, suppressed, omitted or otherwise failed to disclose any information required to be stated or furnished to a borrower under the provisions of this act or any other law of this State.

(3) Failed to comply with or violated any provision of this act or any rule or regulation promulgated by the commissioner pursuant thereto.

(4) Failed to perform a written agreement with a borrower.

(5) Otherwise demonstrated a lack of financial responsibility, unworthiness, bad faith or dishonesty.

The hearing and notice provisions of this section shall not apply in the event the licensee is a corporation if the licensee's corporate charter is voided in accordance with the provisions of any law of this or any other State, in which event the commissioner may suspend or revoke the license forthwith.

b. The commissioner may subsequently reinstate a license which has been suspended or revoked or renew a license which he had previously refused to renew if the condition which warranted the original action has been corrected, and he has reason to believe that such condition is not likely to occur again and that the licensee is worthy of such reinstatement.

24. The provisions of this act shall apply to any secondary mortgage loan:

a. Advertised, caused to be advertised, solicited, negotiated, offered, or otherwise transacted within this State, in whole or in part, whether by the ultimate lender or any other person.

b. Made or executed within this State.

c. Notwithstanding the place of execution, which is secured by real property located in this State.

25. Any obligation on the part of a borrower arising out of a secondary mortgage loan shall be void and unenforceable unless such secondary mortgage loan was executed in full compliance with the provisions of this act.

26. a. Any person who engages in the secondary mortgage loan business in this State without having first obtained a license as required by section 3 of this act shall be liable for a penalty of not more than $1,000.00 for each offense. For the purpose of this subsection, each loan made without a license shall constitute a separate offense.

b. Any person, including any licensee or any partner, officer, director or employee, whether salaried or commissioned, of such licensee, or any other person representing a licensee, whether directly or indirectly, who vio-

lates any provision of this act or any rule or regulation promulgated in connection therewith, shall be liable for a penalty, in addition to all other penalties or forfeitures imposed by this or any other law, of not more than $1,000.00 for each offense. Any person who shall aid or abet such a violation shall be equally liable for such a penalty as may be imposed upon a principal violator. For the purpose of this subsection, a violation of any section of this act or any rule or regulation promulgated by the commissioner pursuant thereto shall constitute a separate offense. The commissioner, in his discretion, is hereby authorized and empowered to compromise and settle any claim for a penalty under this subsection for an amount that appears appropriate and equitable under all of the circumstances.

c. The penalties provided for in this section, if not voluntarily paid to the commissioner, shall be collected in a civil action brought in the name of the commissioner pursuant to the provisions of the Penalty Enforcement Law, L. 1948, chapter 253, 1 et seq., Revised Statutes 2A:58-1 et seq.

27. a. Nothing contained in this act shall be construed to impair or affect any rights of a borrower, civil or criminal liabilities of a licensee or administrative proceedings by the commissioner which hereafter may arise as the result of a secondary mortgage loan made under chapter 91, P. L. 1965, and, provided further, nothing contained in this act shall be construed to impair or affect an obligation of a borrower for a secondary mortgage loan executed prior to the effective date of this act, provided such secondary mortgage loan was lawfully executed in accordance with the provisions of chapter 91, P. L. 1965.

b. A licensee licensed pursuant to the provisions of chapter 91, P. L. 1965, on the date this act takes effect shall continue as a licensee under this act for the year ending December 31, 1970, at which time the licensee shall renew his license under the provisions of this act, if the licensee intends to continue to engage in the secondary mortgage loan business.

28. [Nothing contained in this act shall be construed or interpreted as an expansion or restriction of the existing powers of a State or National bank, savings bank, State or Federal savings and loan association or insurance company to engage in the secondary mortgage loan business, provided such business is otherwise authorized and regulated by law in which event the provisions of this act shall not apply to any such financial institution.] *Nothing in this act shall be construed as expanding or restricting the powers otherwise conferred by law upon financial institutions, such as State and National banks; State and Federal savings and loan associations, savings banks and insurance companies, to engage in the secondary mortgage business as defined in section 3, and no such financial institution, in exercising any power otherwise so conferred upon it, shall be subject to any provision of this act.*

29. If any provision or section of this act or any provision or section of any subsequent amendments or supplements to this act shall be held to be unconstitutional, said provision or section shall be exscinded and the remainder of the provisions and sections of the act as amended or supplemented shall be and remain valid with the same effect as if said provision or section so held to be unconstitutional had never been a part of the act.

Appendix A

30. "An act to define and regulate secondary mortgage loans," approved June 9, 1965 (P. L. 1965, c. 91) is repealed.

31. This act shall take effect on the sixtieth day following the date on which it is enacted.

SUPREME COURT, U.S.
JUL 15 1970
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

Nos. [redacted] 256-257

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,
Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,
Appellees.

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,
Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,
Appellees,

and

PAUL V. DURKIN, *et al.*,
Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Appellee.

On Appeal from the Supreme Court of New Jersey

JOINT MOTION TO DISMISS APPEAL ON BEHALF OF APPELLEES, ANTHONY T. STEFANELLI AND THERESA STEFANELLI, PAUL V. DURKIN AND ELLEN DURKIN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 1688, 1689

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees.

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees;

and

PAUL V. DURKIN, *et al.*,

Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

JOINT MOTION TO DISMISS APPEAL ON BEHALF OF APPELLEES, ANTHONY T. STEFANELLI AND THERESA STEFANELLI, PAUL V. DURKIN AND ELLEN DURKIN

Motion to Dismiss Appeal

The appellees move the Court to dismiss the appeals herein, or in the alternative to affirm the judgment of the Supreme Court of New Jersey, on the grounds that:

1. The appeals are premature in that the judgment of the Supreme Court of New Jersey is not a final judgment.
2. The appeals do not present any substantial federal question.

I. The State Statute Involved and the Nature of the Case

A. *The Statute*

The New Jersey Secondary Loan Act of 1965, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, was a legislative response to a report of the Secretary Director of the New Jersey Real Estate Commission detailing certain abusive lending practices of New Jersey and Pennsylvania lenders acting in concert to the detriment of New Jersey residents. These practices included, among others, false and misleading advertising and exorbitant interest and charges. (Brief of the Attorney General of New Jersey in the Superior Court of New Jersey, Appellate Division, AG1a, paragraphs 4 and 5.)

The report stated in part:

> "Our review showed that, in most cases, the New Jersey second mortgage operator would contact or

be contacted by a financial outlet, usually in the Philadelphia area, where money was available for second mortgages if a specific procedure was followed. After the second mortgage operator was advised how to conduct his business, he generally began to advertise debt consolidation plans offering 'easy' repayment terms . . ." (Brief of the Attorney General in the Superior Court of New Jersey, Appellate Division, AG2a, paragraph 4)

"For the sake of this report, we will take, step by step, the course of a typical case of Mr. Jones. In his effort to obtain $3000 to pay off existing debts, Mr. Jones has been attracted by the 'Smith Second Mortgage Brokerage Company' advertisement. He then makes contact by telephone, and an appointment is arranged for a representative of the 'Smith Company' to come to his home. (Brief of the Attorney General in the Superior Court of New Jersey, Appellate Division, AG3a, paragraph 1)

"The first step of the 'Smith Company' is to have Mr. Jones complete a detailed application . . . After the application has been completed, a picture of the property is secured and a credit report on Mr. Jones is ordered by the 'Smith Company.' When the 'Smith Company' is in possession of the application, pictures and credit report, these are forwarded to 'Triple X Credit Corporation' of Philadelphia, which is actually the second mortgage lender . . . (Brief of the Attorney General in the Superior Court of New Jersey, Appellate Division, AG3a, paragraph 2)

The New Jersey Act established substantive protections for borrowers (N.J.S.A. 17:11A-21 through N.J.S.A. 17:11A-27). Licensing of lenders, brokers and dealers was

the vehicle chosen for policing the operations of secondary mortgage lenders (N.J.S.A. 17:11A-2 through N.J.S.A. 17:11A-20). The Act provides that no secondary mortgage loan made or negotiated in less than full compliance with its terms shall be enforceable in the courts of New Jersey (N.J.S.A. 17:11A-29).

While the Act does not expressly limit its protections to New Jersey residents, it is manifest that such was intended. The Appellate Division of the Superior Court of New Jersey so found, *Oxford Consumer Discount Company of North Philadelphia* v. *Stefanelli*, 102 N. J. Super. 549 (App. Div. 1968), affirmed as modified, 55 N. J. 489 (1970).

B. *The Proceedings Below*

The Superior Court of New Jersey, Law Division, granted summary judgment in favor of Oxford Consumer Discount Company of North Philadelphia (hereinafter "Oxford") against Anthony E. Stefanelli and Theresa A. Stefanelli (hereinafter "Stefanelli" or "Stefanellis"), appellees herein, in an action on a promissory note executed at the Philadelphia office of Oxford in purported conformity with Pennsylvania's Consumer Discount Company Act (*Purdon's Pa. Stat.*, §§ 6201 through 6219). At the same time, the trial court denied the appellees' cross motion for summary judgment made in reliance upon the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, the terms of which were clearly violated by the transaction. Allegations of fraud and other defenses raised by the borrowers were never tried by reason of this summary disposition of the case. *Oxford Consumer Discount Company of North Philadelphia* v. *Stefanelli*, Superior Court of New Jersey, Law Division, Docket No. L-18411-66. The Stefanellis appealed to the Superior Court of New Jersey, Appellate Division.

The Appellate Division found that the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, was intended by the New Jersey Legislature to apply to the Stefanelli transaction; that such application was constitutional and a valid exercise of the legislative power; and that the transaction violated the New Jersey Act in two undisputed particulars, namely the rate of interest charged to the borrowers and the inclusion in the loan documents of a warrant to confess judgment contrary to the proscriptions of N.J.S.A. 17:11A-21 and N.J.S.A. 17:11A-23. The judgment of the trial court was reversed upon the ground that the entire transtion was therefore unenforceable by virtue of N.J.S.A. 17:11A-29. *Id.*, 102 N. J. Super. 549. Following this decision, appellant First Mercantile Consumer Discount Company (hereinafter "First Mercantile"), which was then in litigation with appellees Paul and Ellen Durkin, et al. in a case involving similar legal issues, moved to intervene and be heard upon the question whether the decision of the Appellate Division in the *Stefanelli* case should be applied prospectively only. That litigation, which is still pending, was instituted by the Durkins and others as a class action against several defendants seeking a declaratory judgment as to the construction of the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33. The motion to intervene, together with a motion of the Attorney General of New Jersey for formal intervention as a party, was granted by order of the Appellate Division which also directed the appellees, Durkin to appear as *amicus curiae* to oppose the application of the appellant, First Mercantile. Upon review; after submission of briefs and argument, the Appellate Division, on February 24, 1969, rendered a decision limiting the effect of its original decision upon transactions which preceded the date of that original decision (September 11, 1968). *Oxford Consumer Discount Com-*

pany of North Philadelphia v. *Stefanelli*, 104 N. J. Super. 512 (App. Div. 1969). Thereafter the appellants, Oxford and First Mercantile appealed to the Supreme Court of New Jersey from the whole of the decision of the Appellate Division as originally rendered and subsequently modified. A majority of the Supreme Court affirmed for the reasons expressed by the Appellate Division but further limited the financial relief available to borrowers, including all of the parties in these cases, in connection with transactions entered into prior to the first decision of the Appellate Division. *Oxford Consumer Discount Company of North Philadelphia* v. *Stefanelli*, 55 N. J. 489 (1970). The *Stefanelli* case was remanded to the trial court for a plenary trial on the issue of intermediation by Pennsylvania lenders, through agents or otherwise, within New Jersey to solicit the Stefanelli loan, the determination of which will decide how much financial relief should be available to the Stefanellis as the result of the nonconformity of their transaction with the requirements of the New Jersey Act. This case is now pending before the Superior Court of New Jersey, Law Division.

ARGUMENT

POINT I

The judgment from which this appeal has been taken, lacks finality.

28 U.S.C.A. §1257, which grants jurisdiction to the Supreme Court to review decisions of the highest court of a state, requires that such decisions be "final judgments or decrees". *Montgomery Bldg. & Court-Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178, 180 (1952). The decision of the New Jersey Supreme Court herein, from

which the appellants appeal, is not a final judgment or decree. See *Oxford Consumer Discount Co. of North Philadelphia* v. *Stefanelli*, 55 N. J. 489 (1970).

Because of the procedure adopted by the New Jersey courts below, the New Jersey Supreme Court decided in *Stefanelli, supra,* only the issue of applicability of New Jersey's Secondary Mortgage Loan Act [N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33] to the type of transactions involved, without ultimately deciding the rights of the parties. By its intervention in *Stefanelli, supra,* First Mercantile, defendant in a class action by the appellees, Durkin, sought and obtained in effect a declaratory judgment as to the applicability of New Jersey Secondary Mortgage Loan Act to the class of borrowers purportedly represented by the Durkins. However, the decision of the New Jersey Supreme Court did not decide finally the rights and obligations between the parties, arising from the transactions between them. The New Jersey court held that hypothetical transactions which were entered into between the Pennsylvania lenders and New Jersey borrowers subsequent to September 11, 1968 were unenforceable in New Jersey, if they violated the provisions of the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33. As to transactions consummated prior to September 11, 1968, which includes the Stefanelli transaction, the case directly before the Court, and the Durkin transaction, the case indirectly before the Court, the issues were remanded for trial to determine whether or not there were solicitations of loans in New Jersey by an intermediary of the Pennsylvania lenders.

It is significant that there are no actual post September 11, 1968 transactions before the Court. Indeed, counsel for First Mercantile in the oral argument before the New Jersey Supreme Court stated that his client had

ceased making such loans after the Appellate Division decision on September 11, 1968. Thus, the "affirmance" by the New Jersey Supreme Court did not finally determine an actual case or controversy. The *Stefanelli* case has been remanded for further proceedings on the issue of New Jersey solicitation by intermediaries. That proceeding will resolve issues which will determine the rights of the appellant, Oxford and the appellees, Stefanelli. Without the prior determination of those issues, the decision of this Court in the pending appeal will not finally resolve the litigation between those parties.

If this Court affirms the New Jersey Supreme Court, the parties still will have to litigate the issues involving the use of New Jersey intermediaries by the appellants which were remanded by the New Jersey Supreme Court for trial. If this Court reverses the decision of the New Jersey Supreme Court, the parties still will have to litigate the issue as to whether the use of New Jersey intermediaries by the Pennsylvania lenders constitutes sufficient contact with New Jersey to afford it jurisdiction to impose its regulations on the transaction apart from the issues posed in this appeal.

Indeed, First Mercantile, the appellant herein in Docket No. 1688, has no direct interest in the outcome of the Oxford-Stefanelli controversy which is yet undetermined in the New Jersey courts. In the *Durkin-First Mercantile* case below, there is no determination at the trial level and an interlocutory appeal is pending in the Appellate Division of the New Jersey Superior Court to determine the propriety of an order denying First Mercantile's motion to dismiss on the ground that the suit by Durkin is not a proper class action under the New Jersey Rules of Civil Procedure. *Lindley Henry, Jr., et al.* v. *First Mercantile Consumer Discount Company*, Superior Court of New Jersey, Appellate Division, Docket No. A-164-68.

The requirement that the state court judgment from which the appeal is taken to this Court be "final" is a jurisdictional requirement of 28 U.S.C.A. §1257. Although there is no easy formula to determine finality, prior decisions of this Court have established the philosophy underlying the requirement of finality. In effect, this Court has refused to interfere with state court proceedings until the controversy there has been finally resolved. *Republic National Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67-69 (1947); *Stern & Grassman, Supreme Court Practice* (1969), §3.7, p. 93.

Justice Frankfurther explained the requirement of "finality" as follows [*Republic Natural Gas Co.* v. *Oklahoma*, *supra*, 334 U. S. at 67-68]:

> "* * * Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. * * *"

It has been well established that 28 U.S.C.A. §1257 requires that the "final" judgment appealed to this Court be subject to no further review or correction by the state tribunal and must constitute an effective termination of the litigation between the parties. *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U. S. 548 (1944).

The fact that the New Jersey Supreme Court used the term "affirmed" in approving in part the decision below is not significant. It is the effect of the decision which is determinative of the question of finality. *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 548 (1946). In the case at bar, there is no finality in respect to the actual controversy between the parties. The New Jersey Court has

decided the applicability of the statute in question, but, in limiting the effect of that decision retrospectively, it has interjected a factual issue yet to be resolved, namely the solicitation or other use of intermediaries by the lenders in New Jersey. That crucial issue has been remanded to the trial division of the New Jersey Superior Court for determination within the limits of the state Supreme Courts decision. Obviously, the posture of the case as to these parties is interlocutory, and the issue of intermediation in New Jersey will have a significant constitutional impact on the application of the statute in question to the transaction of these parties.

While it appears that this Court has entertained jurisdiction over cases not completely resolved under its conception of separable and independent matters, *Hudson Distributors* v. *Eli Lilly & Co.*, 377 U. S. 386 (1964); *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963); *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U. S. 542 (1963), the circumstances in those cases were such that the decision of this Court would resolve the entire litigation or in some instances prevent irreparable harm to the litigants by resolving a crucial issue which would materially affect the conduct of the litigation and the rights of the parties pending its final determination.

In *Hudson Distributors* v. *Eli Lilly & Co.*, *supra*, for example, the Ohio Supreme Court had held the Ohio Fair Trade Act valid and not "in violation of the Constitution of the State of Ohio nor of the Constitution of the United States * * *". At the time of the appeal to this Court there were pending and unresolved in Ohio questions concerning the interpretation of the Ohio Act not made or considered by the Ohio courts nor raised by the facts of the case. Notwithstanding, this Court noted probable jurisdiction [*Hudson Distributors* v. *Eli Lilly &*

Co., 375 U. S. 939 (1963)] on the ground that the issues pending in the Ohio courts and subject to further proceedings were separate and independent matters which did not render the judgment under appeal non-final. *Supra* 377 U. S. at 389-390. It appears that the validity of the Ohio act was an issue capable of finally determining the litigation between the parties. In addition, the unresolved issues were collateral to the rights of the parties since they involved matters not raised by the facts in the case on appeal. In his dissenting opinion in *Hudson Distributors* v. *Eli Lilly & Co., supra,* 377 U. S. at 397, Justice Harlan argues persuasively for preserving the doctrine of "finality" as a prerequisite to this Court's review of state court decisions:

> "Although the distinction between final and non-final judgments, for purposes of this Court's jurisdiction, has been 'faint and faltering at times,' *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 69, 92 L. ed. 1212, 1220, 68 S. Ct. 972, it has not disappeared altogether. The nature of the distinction and the reasons for maintaining it have repeatedly been stated. To be reviewed in this Court, a state court judgment must be 'final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' *Market Street R. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551, 89 L. ed. 1171, 1176, 65 S. Ct. 770. It 'must end the litigation by fully determining the rights of the parties . . . .' *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 546, 91 L. ed. 1662, 1665, 67 S. Ct. 1428."

And at 377 U. S. page 400, the Justice continued as follows:

> "In addition to making an uneconomic use of its own time, the Court's entertainment of these appeals has interfered with the orderly procedures of the Ohio courts. In its brief to this Court, Lilly states that proceedings in the Court of Common Pleas have been stayed 'pending the outcome of this appeal.' Brief, p. 11. Upjohn states in its brief that it has not yet taken action to bring to trial the issues reserved in its case. Brief, p. 13, presumably because of the pendency of the present proceedings. So far as the litigants are concerned, this march to the well for an eye-dropper of water does them no good either, except insofar as delay may be temporarily useful to one party or the other. Now that this Court's decision is rendered, the action will presumably go forward in the state courts; the litigants are no better informed of their ultimate rights than they were before the case came here, and the case is not a jot closer to its conclusion."

For the same reasons, it is respectfully submitted, that this appeal will determine little in respect to the actual controversy between the parties and should be dismissed for lack of finality in the judgment below. To do otherwise will only delay the ultimate determination of the rights of the parties; a delay which will permit the continued collection of disputed loans by the appellants pending the completion of this fruitless and time consuming expedition in pursuit of an abstract question of law.

POINT II

These appeals present no substantial federal question.

A. The interstate commerce clause of the United States Constitution, Article I, Section 8, is not violated by application of the New Jersey Secondary Mortgage Loan Act to the transaction here involved.

In *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881 (1965), appeal dismissed for want of a substantial federal question *sub nom. Fairfax Family Fund, Inc.* v. *California*, 328 U. S. 1 (1965). This Court had before it the question whether the State of California violated Article I, Section 8 of the *United States Constitution* by requiring that a Kentucky corporation be licensed under the *California Financial Code*, §§24200 through 24651, as a condition for doing a small loan business with Californians. In *Fairfax*, the Kentucky lender mailed printed matter to California residents soliciting business. The potential California borrower executed and returned to Kentucky a loan application and promissory note. The Fairfax Company secured a California independent contractor to conduct a local credit investigation. If the loan was approved in Kentucky, a check was mailed from there to the borrower who in turn made repayment of the loan to the Kentucky office of the Fairfax Company. Fairfax maintained no offices in California nor did any of its corporate officers reside there. Its impact upon the economy of California was clear, however, from the fact that it had $3,500,000 in outstanding loans to California residents. As the result of the failure of Fairfax to secure a small loan license in California, the commissioner of corporations of that state issued a restraining order enjoining it from continuing to conduct a small loan business with Californians. Fairfax appealed, contend-

ing that to require it to be licensed by the State of California would create an unconstitutional burden on interstate commerce. Both the California high court and this Court disagreed, the California court citing *California* v. *Thompson*, 313 U. S. 109 (1940); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944); and *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U. S. 276 (1961) among other authorities in support of its holding that California had the power to require licensing as a protective measure for its residents.

Examination of the California legislation makes it obvious that licensing in that state is more than a mere ministerial undertaking. The *Financial Code* of California, §§24200 through 24651, like the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, provides for in-depth, continuous and thorough supervision of licensees.

Sections 24400 through 24414 of the California Act authorize detailed regulation by the commissioner of the conduct of the licensee's business (§§24402, 24403, 24404 regulate places of business; §§24406, 24407 and 24408 require that offices, books and records be accessible to the commissioner and that an annual report be filed).

Sections 24450 through 24457 of the California Act regulate loan terms and conditions and proscribe enforcement in California of loans not conformable therewith.

Sections 24600 through 24612 of the California Act provide for revocation or suspension of licenses and in this connection reiterate the power of the commissioner to inspect books and records as well as offices of licensees.

These provisions, applied to a Kentucky corporation doing a mail order business, were justified in *Fairfax*

because California owed a duty of protection to its citizens. In the present appeals, we are on no different ground. By dismissing the appeal in *Fairfax*, this Court has decided the interstate commerce argument raised by appellants herein in favor of the regulatory rights of New Jersey.

B. The due process clause of the Fourteenth Amendment of the United States Constitution is not violated by Application of the New Jersey Secondary Mortgage Loan Act to the transactions here involved.

The thrust of the appellants' due process argument is that, by applying the New Jersey Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, to their transactions, New Jersey makes an unconstitutional extraterritorial application of its local law. Such argument rests upon the implied notion that traditional choice of law formulations (e.g. "place of execution" or "place of repayment" govern validity of a contract) always rise to the level of constitutional mandates. Clearly, however, such an assertion is inconsistent not only with the decision in the *Fairfax* case, *supra*, but with other cases as well. See, for example, *Hoopeston Canning Company* v. *Cullen*, 318 U. S. 313 (1942); *Osborn* v. *Ozlin*, 310 U. S. 53 (1940); *Robertson* v. *People of California*, 328 U. S. 440 (1946) in all of which the *decideratum* of constitutionality was the legitimate interest of the forum in the transaction under review.

The contacts of New Jersey with the transactions of the appellants herein are multiple. These lenders concede that they have more than $10,000,000 outstanding in secondary mortgage loans to New Jersey borrowers. This deep imposition upon the economy of New Jersey, with its effect on New Jersey borrowers and their mortgaged homesites in New Jersey, is a significant contact, justifying New Jersey regulation. In addition, the resources

for repayment are generally earned in New Jersey; borrower credit investigation takes place in New Jersey;* the mortgages taken as security for their loans are recorded by the appellants in New Jersey and the lien imposed perfected by New Jersey's administrative and judicial facilities; and ultimately it is the courts of New Jersey to which the lenders look for enforcement of their claims. These contacts taken together are of sufficient importance to entitle New Jersey, in pursuit of the protection of its citizens, to require licensing as a condition for doing business with New Jersey borrowers. There is no more "enforced domestication" in the appeals here presented than was present in the *Fairfax* case, wherein this Court found that the licensing requirements of California did not present a substantial federal question.

C. The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, is not violated by application of the New Jersey Secondary Mortgage Loan Act to the transactions here involved.

The full faith and credit clause of the *United States Constitution*, does not require the courts of New Jersey to enforce a contract valid under nonforum law, if enforcement will subvert the strong public policy of the forum state. *Alaska Packers Ass'n.* v. *Industrial Accident Comm.*, 294 U. S. 532 (1935); *Klaxon Company* v. *Stentor Electric Manufacturing Company*, 313 U. S. 487 (1941); *Watson* v. *Employers Liability Insurance Corp., Ltd.*, 348 U. S. 66 (1954).

The judgment was reached by the New Jersey Legislature in 1965 that its legitimate concern for the protec-

* Oxford concedes that the Stefanelli loan was consummated within minutes of his first appearance at their Philadelphia office.

tion of New Jersey residents required an act of general application to all secondary mortgage contracts made by them involving their homes in New Jersey. A substantial number of New Jersey residents were jeopardized by the abuses which were reported to the Legislature and which gave rise to its Act. These abuses had a palpably deleterious effect upon the economic safety and well being of New Jersey and its citizenry. New Jersey institutions, agencies and facilities were being utilized to further the process of intimidation, and Pennsylvania lenders, using their out-of-state status as a protective shield, were among the prime offenders. By its enactment, the New Jersey Legislature announced its resolve to equalize the bargaining positions of lender and borrower by direct local supervision of all such transactions in the interest of its residents to whom it owed a duty of protection. Under the New Jersey Act, all licensees are subject to the same kind and degree of regulation and all secondary mortgage loan transactions with New Jersey residents involving New Jersey real estate are subject to the same limitations and restrictions. A departure from this regulatory design would indeed violate the strong public policy of New Jersey which dictates an even-handed, active and thorough supervision of lenders engaged in such business with New Jersey residents. To the extent that New Jersey is unable to license it is unable to regulate. To the extent that it is unable to regulate, its strong public policy of protecting its citizens is, in the most fundamental sense, subverted.

By choosing to enforce its own law, rather than Pennsylvania law, in its own courts, New Jersey acts squarely within the authority of *Fairfax* and well within constitutional limits.

CONCLUSION

Appellees respectfully submit that the appellants' appeals are premature because no final judgment has been rendered by the highest court of New Jersey, and further, that the issues raised by the appellants present no substantial federal question. Therefore, these appeals should be dismissed, or the judgment below affirmed.

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July 13, 1970

SUPREME COURT, U. S.

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 257

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY TO APPELLEES' MOTIONS TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1689

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY TO APPELLEES' MOTIONS TO DISMISS APPEAL

The motions to dismiss filed by Appellees are based upon two contentions: (1) The judgment appealed from lacks finality within the meaning of 28 U. S. C. §1257, and (2) the appeal does not present substantial federal questions.

1. Finality

Appellees seize upon the remand for trial on certain factual issues as a main ground for their motions to dis-

miss this appeal. But the pleas for factual clarification ignore the critical question: whether there are fundamental federal questions separable from factual matters which present important issues and which in justice to the litigants should be decided without delay; not whether it would be easier or more convenient for this Court to decide the case if review were had after a trial had been concluded and appealed.

The modern cases demonstrate that parties will not be required to have their constitutional rights suspended while they are litigating their way through a maze of lower courts, see *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 558, and *Construction Laborers* v. *Curry*, 371 U. S. 542, 549-51,[1] unless there is an identity of constitutional criteria between fact and law. Such an identity existed, for example, in *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 575 and *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 547, cited by Appellees. In *Rescue Army* the constitutionality of certain sections of the Los Angeles municipal code could not reasonably be determined in advance of proof as to the conduct of the defendant; in *Gospel Army* this Court declared that it could not assume that the California Supreme Court would find the ordinance constitutional under all factual circumstances.

It is obvious, however, that the New Jersey Supreme Court has found the Secondary Mortgage Loan Act of 1965 constitutional under all circumstances (except with regard to its *retroactive application*, where the separate factual determinations to be made in each case do not in-

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[1] See also, dissent of Mr. Justice Black in the denial of petition for writ of certiorari, *Rederi A/B Disa* v. *Cunard Steamship Co., Ltd.*, 389 U. S. 852.

volve issues of constitutional dimension). Appellees would have Oxford, First Mercantile Consumer Discount Company (Appellant in companion case No. 1688) and all other Pennsylvania loan companies in similar situations cease doing secondary mortgage loan business in Pennsylvania with New Jersey residents while various cases in the New Jersey state courts are pleaded, listed for trial, adjourned, delayed for discovery proceedings and motions, tried, appealed to the New Jersey Appellate Division, to the New Jersey Supreme Court, and again to this Court.[2]

The specific constitutional questions at issue here are whether the full faith and credit, interstate commerce and due process clauses preclude enforcement of the Secondary Mortgage Loan Act of 1965 against out of state lenders, both as to past and future transactions. At the present time the law of the case is that those constitutional provisions do not prohibit New Jersey control over out-of-state secondary mortgage loans involving New Jersey residents. *The same questions and the same answers will remain as to all future conduct of non-New Jersey lenders whether Oxford "wins" or "loses" on the issue of intermediation in a New Jersey trial court, and indeed without reference to the result of any trial or the facts developed there.* As to past transactions, a determination by this Court that the New Jersey Act cannot constitutionally be applied to out-of-state loans would obviate numerous state court cases.

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[2] Such appeals are almost certain regardless of which party prevails, because no clear lines have been drawn defining "intermediation"; and it is likely that such lines will not clearly be drawn until three, four or more cases have been tried and appealed, since each decision will do no more than state whether some particular conduct (if any) in a single transaction did or did not constitute "intermediation".

The criteria for determining whether a state court judgment is "final" for purposes of §1257(2) as set forth in the *Langdeau* and *Curry* cases were summarized in *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1, 15 L. ed. 2d 39 (Goldberg, J., in Chambers), as follows:

(1) A final assertion of jurisdiction, with no further review of that issue possible in the state courts;

(2) A threat of serious erosion of national policy; and

(3) A state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case.

Analysis of the present case shows that all three criteria are met.

(1) Appellees do not dispute that the judgment of the Supreme Court of New Jersey constitutes "a final assertion of jurisdiction, with no further review of that issue possible in the state courts."

(2) As Mr. Justice Goldberg stated in the *Rosenblatt* opinion, the denial of an individual's constitutional rights by excessive assertion of state power does constitute a "threat of serious erosion of national policy" within the meaning of *Langdeau* and *Curry*.

(3) The fact that prospective application of the New Jersey Act has been held absolute and will thus remain unaffected by any factual determination on remand demonstrates that the issues in question are "anterior to and separable from the merits, and not enmeshed in the factual controversies of the case."

We ask the Court to note probable jurisdiction and "finally determine" claims of right separable from, and collateral to, rights asserted in the action, too important

to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

2. Substantiality of the Federal Questions Presented

(A) Appellees' reliance upon this Court's dismissal of appeal for want of a substantial federal question in *Fairfax Family Fund, Inc.* v. *California*, 382 U. S. 1, is misplaced. The facts were different. The issue was different. Two of our constitutional questions were not involved.

Fairfax Family Fund, Inc. was a Kentucky corporation engaged in the business of making small loans by mail to residents of many states, including California. The loan business was solicited through the mails; the prospective borrower would execute and return by mail a loan application and promissory note. If the loan were approved (a credit check having been made by a California independent agent) Fairfax would mail a check to the borrower, and monthly payments would be returned to the lender at its offices in Kentucky. Fairfax had no offices in California, nor did any of its corporate officers reside there. The attorney general of California brought an action to *enjoin Fairfax from conducting this business there until it obtained a license to do so* pursuant to the California Financial Code. The California courts ultimately held that Fairfax would be required to obtain a license from the State.

The issue in *Fairfax* was thus distinct from the questions presented in our case. Chief Justice Weintraub and the other dissenters from the New Jersey Supreme Court's opinion were not the only judges who perceived

this difference.[3] The California court expressly acknowledged the difference in distinguishing *Fairfax* from *International Textbook Company* v. *Pigg*, 271 U. S. 91, when it stated that *Pigg* "was a case involving the *foreign corporation's right to sue in the state court, which is not the issue before this court.*" (Emphasis added.) *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 886, 47 Cal. Rptr. 812, 815.

In *Fairfax* it was the "contacts" which the Kentucky corporation had with California which led the state court to hold that the foreign lender was required to obtain a license before it could do business there. An analysis of the various relevant contacts in *Fairfax* and in the present case reveals the following:

	Fairfax	*Oxford*
1. Borrower a resident of forum state	Yes	Yes
2. Lender goes to forum state, rather than borrower leaving forum state	Yes	No
3. Loan negotiated in forum state	Yes	No
4. Promissory note signed in forum state	Yes	No
5. Money received in forum state	Yes	No

With different operative facts and a different issue at stake the constitutional arguments in *Fairfax* involved solely the commerce clause, and then only as it applied to the licensing question. Neither the full faith and credit nor the due process clauses was involved at all.

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[3] See Oxford's Appendix, p. 6a, footnote 1. "This case is unlike [*Fairfax*] with respect to both the facts and the issues involved. * * * [T]he question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained."

(B) Oxford's assertion in its Jurisdictional Statement that the mandate of the full faith and credit clause cannot be ignored here (notwithstanding appellees' arguments regarding the exception for enactments "obnoxious to the public policy" of the forum state) is reinforced by an examination of the pending New Jersey legislation to which its Attorney General adverts in his motion to dismiss (pp. 23-24).

First, it should be noted that in the Statement annexed to the original Senate bill[4] it is admitted that the Secondary Mortgage Loan Act of 1965 permitted effective interest rates far in excess of those allowed in Pennsylvania:

> "The allowance of specified fees and charges provided a method whereby licensees were able to circumvent the policy and spirit of the legislation, since the combination of fees and charges plus interest amounted to an effective interest rate charge far in excess of that contemplated by the Legislature. On loans under $1,000.00, the fees and charges combined with the interest allowed may be equivalent to *an effective interest rate in excess of 50%*. In general, calculation of fees, charges and interest on loans of $2,000.00 or less establish that the total sum thereof paid by many borrowers is equivalent to *an effective interest rate of 20 to*

[4] New Jersey Senate Bill No. 289 (set forth in Appendix A to the New Jersey Attorney General's motion to dismiss and brief, pp. 1a-27a), is a remake of Senate Bill No. 506, introduced February 11, 1969. Both Senate bills concluded with the Statement referred to above, the full text of which is set forth in the Supplemental Appendix at the conclusion of this brief. The Statement was omitted from the text of the bill in the "official copy reprint" reproduced in the New Jersey Attorney General's Appendix A.

50%, depending upon the amount and term of the loan." (Emphasis added.)

The thrust of the figures presented in footnote 15, pp. 24-26 of our Jurisdictional Statement—that enforcement of the Pennsylvania Act could hardly be deemed violative of New Jersey public policy when the borrower pays more for his loan under the New Jersey Act than he does under the Pennsylvania Act—is thus admitted by the legislature in its attempted revamping of the New Jersey Act.

Second, the immediate increase in allowable interest rate to 15% with further provision for increase to as much as 18% provided in Senate Bill No. 289 clearly reflects legislative recognition of the validity of the arguments made by Oxford in the New Jersey courts—that addition of heavy fixed charges to an ostensibly lower interest rate was more devastating to the borrower than the combination of interest rate and charges provided for under the Pennsylvania Act. It was the difference in flat interest rates upon which Judge Conford so heavily relied in determining for the Appellate Division that the public policies of the two states varied sufficiently to make refusal to enforce Pennsylvania obligations in New Jersey constitutionally permissible. Even the Attorney General of New Jersey concedes that enactment of Senate Bill No. 289 would effectively eliminate all but the most technical differences between the Pennsylvania and New Jersey Acts. In sum, intellectual honesty demands cognizance of the fact that whether or not the proposed legislation is enacted the public policies of Pennsylvania and New Jersey do not differ substantially, and certainly not to the extent where one could be deemed "obnoxious" to the other. This Court has held that such differences in comparable statutes cannot be utilized to overcome

the constitutional requirements of the full faith and credit clause. *Bradford Electric Co., Inc.* v. *Clapper*, 286 U. S. 145, 161-62.

CONCLUSION

For the reasons stated above and in our Jurisdictional Statement, we respectfully urge that Appellees' motions to dismiss be denied and that probable jurisdiction be noted.

Respectfully submitted,

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[SUPPLEMENTAL APPENDIX FOLLOWS]

SUPPLEMENTAL APPENDIX

Senate Bill No. 289

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1970 SESSION

By Senators TANZMAN, BATEMAN and McDERMOTT

* * *

STATEMENT

This bill embodies a total revision of the Secondary Mortgage Loan Act of 1965. Any differences in specific statutory language between this revision and the predecessor Act are not indicative of a legislative intent as to the construction and interpretation of the Act of 1965. The changes made, instead, represent an accommodation to the total revision of the law. Therefore, the changes embodied herein should not affect any existing court proceedings concerning the interpretation and construction of the Secondary Mortgage Loan Act of 1965, or any such proceedings which may be subsequently filed based on that Act.

This revision incorporates provisions which were found necessary as a result of the investigations and hearings conducted by the Department of Banking and Insurance and the Office of the Attorney General, wherein certain secondary mortgage loan licensees were called upon to show cause why their licenses should not be suspended or revoked for activities in violation of the Act of 1965.

One of the most significant changes is in the amount of money derived from the making of a secondary mortgage loan. This bill makes a significant departure from the present law by disallowing the receipt of any fees or charges by a licensee in connection with a secondary mortgage loan, other than interest allowable pursuant to the terms of this legislation. Experience has shown that a large percentage of licensees have consistently been receiving the maximum allowable fees and charges under the Act of 1965, in addition to the interest permitted thereunder. The allowance of specified fees and charges provided a method whereby licensees were able to circumvent the policy and spirit of the legislation, since the combination of fees and charges plus interest amounted to an effective interest rate charge far in excess of that contemplated by the Legislature. On loans under $1,000.00, the fees and charges combined with the interest allowed may be equivalent to an effective interest rate in excess of 50%. In general, calculation of fees, charges and interest on loans of $2,000.00 or less establish that the total sum thereof paid by many borrowers is equivalent to an effective interest rate of 20 to 50%, depending upon the amount and term of the loan.

This bill corrects these abuses by establishing an interest rate which is commensurate with the risk involved in this type of loan and which takes into account the fact that no other fees and charges are permissible in connection therewith. The interest rate is established with a view toward assuring a reasonable profit to the licensee so that the money market in this area will not dry up. On the other hand, the rate is reasonable from the standpoint of the borrower involved. To assure that the rate continues to be adequate under the circumstances exist-

ing at any given time, the rate is made flexible to a maximum of 18% per year, by utilizing a procedure similar to that set forth in the amendment to the usury statute of 1968.

SUPREME COURT, U. S.

AUG 29 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 256

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees,

and

PAUL V. DURKIN, *et al.*,

Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANT FIRST MERCANTILE CONSUMER DISCOUNT COMPANY

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Order of Superior Court of New Jersey, Law Division—Essex County 1a

Introduction

This appeal is taken from a 4 to 3 decision which radically departs from settled constitutional principles. The decision is hardly explainable except in the context adverted to by Chief Justice Weintraub in dissent, namely, the "emotional overlay" of a case involving loans at high interest rates. 55 N.J. at 494-95, 262 A. 2d at 877. While the Chief Justice and Justices Hall and Haneman were able to eschew the emotional context—"the case must be decided in that light [that the interest rates have received legislative approval] *and not some personal one*," 55 N.J. at 495, 262 A. 2d at 878 (emphasis added)—the implication is that the other four Justices could not.

Appellees seek the same emotional reaction here. They use heightened language in their briefs. They charge the lenders with "deliberative efforts to avoid New Jersey supervision, such as maneuvering the traditional incidents of a loan transaction to an out-of-state *situs*" (NJAGb19), although there is no proof of this assertion in the record.*

Nor is there proof of the repeated accusations of "victimization" (*e.g., Id.*). The 1965 report of the New Jersey Real Estate Commission, which is relied upon by appellees and by the courts below, constitutes extra-record evidence—hearsay twice removed—by a commission consisting of New Jersey real estate brokers with vested interests in the protectionist legislation they proposed. As can be demonstrated in a plenary brief, it is a report

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* The record does show that the lenders are Pennsylvania corporations, licensed and regulated by Pennsylvania, and having offices only in Pennsylvania. While Oxford is publicly owned, First Mercantile is closely held and its stockholders are Pennsylvania residents.

which does not relate to *licensed* Pennsylvania lenders, still less to the licensed lenders involved in the case at bar. Improperly influenced by this report, the courts below have summarily subjected millions of dollars in loans to forfeiture.

In any event, First Mercantile stands ready to try these issues. Indeed, it is anxious to clear its name. But a trial on the constitutional questions, as is observed *infra*, will only be possible if this Court reverses the judgment below. Absent reversal, appellees will have succeeded in obtaining summary judgment of significant constitutional issues despite the presence of crucial factual disputes.

POINT I

The judgment below is final.

The weakness of appellees' position on the merits is manifest in their strenuous argument, placed in the first point of each of their briefs, that this Court should not resolve a fundamentally important interstate controversy on the technical ground that there is no final judgment.

But the finality principle in 28 *U.S.C.* §1257 does not hobble this Court with technicalities. It does not require rejection of Pennsylvania's plea that this matter be reviewed because Pennsylvania's "vital interests will be adversely affected if the decision of the New Jersey Supreme Court is not reversed" (*Amicus brief*, p. 2).

Nor do technicalities prevent this Court from considering a New Jersey judgment which, since 1968, has effectively precluded Pennsylvania licensees from making secured loans in Pennsylvania to New Jersey borrowers, and which subjects millions of dollars in presently out-

standing Pennsylvania loans to arbitrary forfeiture in the courts of New Jersey.

Appellees are well aware that they and many other New Jersey borrowers have ceased paying back Pennsylvania loans on the basis of the judgment below. And appellees are surely aware that, if this Court declines to act, even on a technicality, numerous other borrowers now awaiting the final word of the highest court, will likewise cease repayments. Thus, what appellees shrewdly argue is premature now, will be overripe later. Indeed, insofar as some lenders are concerned, it will be utterly moot, except in the bankruptcy context.

Appellees' finality argument is shrewd for another reason. They are aware that the New Jersey Supreme Court has entered final judgment not only with respect to all Federal consitutional issues, but on the merits in their entirety.* Appellees are also aware that the New Jersey Supreme Court's remand does not involve the judgment itself, but whether that judgment shall be fully or only partially retroactive.

In these circumstances, appellees are certainly aware that the question of retroactivity is a State, not a Federal issue—the "intermediation" question will be decided under State law, without a glance to the Commerce Clause and its interpretation by this Court—and that it is an issue which will not be reviewed by this Court. See *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). Hence, it is merely shrewd (and perhaps misleading) for appellees to suggest to this Court that its failure to act now will someow produce a record

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* Appellees concede that "The New Jersey Court has decided the applicability of the statute in question. . . ." (*Joint Motion*, pp. 9-10).

below on the constitutional issues; that there is some missing element which will be supplied on the remand below.

It is interesting to note that while the Attorney General of New Jersey strenuously argues in Point I of his brief that only a further trial will establish a complete record on the constitutional issues, he has no problem dealing with these issues, and supplying his own allegations in lieu of facts, in Point II of his brief. It is even more interesting to note that the Attorney General, while having the right to intervene in any proceeding involving the constitutionality of a state statute, *N.J.R. Civ. Proced.* No. 4:28-4(a) and (d), has already notified the New Jersey Superior Court that he will not participate in the trial of this matter on the New Jersey Supreme Court's remand.*

There is no doubt that a trial is required here. But that trial, to be productive, must be a trial of the constitutional issues, not of the question of partial retroactivity. And it must be a trial in the framework of proper constitutional principles, not on the basis of the decision below which *holds* that New Jersey can regulate Pennsylvania licensees and Pennsylvania loans, *without proof of fraud or substantial intrastate activities in New Jersey.*

Appellees' finality argument is askew, off-center. They claim that post-judgment relief, which may or may not be granted, renders the judgment itself interlocutory (p. 10 of *Joint Motion*). They confuse purely State is-

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* This is reflected in an Order of the New Jersey Superior Court, entered April 28, 1970 and reprinted in a Supplemental Appendix, attached hereto. The Order adjourns proceedings on the remand "pending final disposition of the aforementioned appeals by the Supreme Court of the United States."

sues, such as the meaning of "intermediation," with matters of Federal constitutional dimension. They rely heavily on older, restrictive precedents and slough off or disregard the more recent decisions of this Court.

A fair analysis of the practical considerations presented by the case at bar, in the light of the legal principles articulated by this Court, clearly demonstrates that this is an appeal from a final judgment and this Court has jurisdiction to entertain it:

1. *Further proceedings on remand*: Appellees suggest that the New Jersey Supreme Court's remand on the question of retroactivity shows that there is no "final word of a final court," *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548, 551 (1945). But finality is not so simply resolved. There is a "penumbral area" which is not susceptible to "a mechanical rule." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124-25 (1945). There is a "twilight zone" which requires a "practical rather than a technical construction" of the finality rule. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964). Thus, finality "does not necessarily mean the last order possible to be made in a case," *Id.*, particularly as it has been interpreted in recent years. See *United States* v. *McWhirter*, 376 F. 2d 102, 104-05 (5 Cir. 1967); Stern & Gressman, *Supreme Court Practice* §311, pp. 96-99 (4th ed. 1969). In case after case, involving appeals from State as well as Federal courts, the fact that further proceedings below were contemplated, *e.g.*, that the judgment under appeal involved a remand, did not of itself preclude this Court's determination of important issues.*

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* *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120,

(*Footnote continued on following page*)

2. *Reasons for the finality rule*: "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice." *Radio Station WOW, Inc.* v. *Johnson, supra* (326 U.S. at 124). It avoids piecemeal review. See *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 152-53); *Hudson Distributors* v. *Lilly & Co.*, 377 U.S. 386, 398-400 (1964) (Harlan, J., dissenting). There are two aspects to this point:

First, if the appeal could be mooted by reason of the result in further proceedings below, jurisdiction may be declined, see *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948); *cf. Brady* v. *Maryland*, 373 U.S. 83, 85 at n. 1 (1963), although recent rulings have accepted appeals notwithstanding potential mootness. See *Avery* v. *Midland County*, 390 U.S. 474, 487 (1968) (Harlan, J.,

(*Footnote continued from preceding page*)

123-27 (1945); *Land* v. *Dollar*, 330 U.S. 731, 734 at n. 2 (1947); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 at n. 3 (1949); *Johnson* v. *Muelberger*, 340 U.S. 581, 583 (1951); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co.* v. *United Eng. & F. Co.*, 351 U.S. 445 (1956); *Goodall-Sanford* v. *United Textile Workers*, 353 U.S. 550, 551 (1957); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304-311 (1962); *Local No. 438* v. *Curry*, 371 U.S. 542, 548-51 (1963); *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963); *Brady* v. *Maryland*, 373 U.S. 83, 85 at n. 1 (1963); *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 249 at n. 2 (1964); *Hudson Distributors* v. *Lilly & Co.*, 377 U.S. 386, 389 at n. 4 (1964); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964); *Rosenblatt* v. *American Cyanamid Company*, 15 L. Ed. 2d 39, 42-43 (Goldberg, J., in chambers, 1965), *appeal dismissed*, 382 U.S. 110 (1965); *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966); *Avery* v. *Midland County*, 390 U.S. 474, 478 at n. 2 (1968).

dissenting); *Mills* v. *Alabama*, 384 U.S. 214, 222-23 (1966) (Harlan, J., dissenting); *Rosenblatt* v. *American Cyanamid Company*, 15 L. Ed. 2d 39, 42 at n. 7 (1965) (Goldberg, J., in chambers).

In any event, the Federal constitutional issues projected in the instant appeal cannot be mooted by further proceedings because such proceedings are limited to the single issue of full versus partial retroactivity of the judgment. No matter what happens below, appellants would still be precluded from making secured loans to New Jersey residents unless appellants establish an office in New Jersey, obtain a license from New Jersey and comply with New Jersey regulations. And no matter what happens below appellants could not recover interest on their loans to the appellee-borrowers.

Hence, there is no potential mootness here. If jurisdiction is declined now, on the ground of lack of finality, appellants will be compelled to appeal the same issues again.

Second, there is the reluctance to review appeals where further proceedings below "may generate additional federal questions." *Republic Natural Gas Co.* v. *Oklahoma*, *supra* (334 U.S. at 71-72); but see the more recent case of *Hudson Distributors* v. *Lilly & Co.*, *supra* (377 U.S. 386), where the appeal was accepted despite the presence of Federal questions which were yet to be resolved by the Ohio courts and despite the fact that "there is every likelihood that the cases will be brought back to this Court for a second time . . ." *Id.* at 399 (Harlan, J., dissenting).

Here, however, no such likelihood exists. Rather, as in *Radio Station WOW, Inc.* v. *Johnson*, *supra* (326 U.S. at 127), the proceeding on remand "could not remotely give rise to a Federal question" because it will concern the

single issue of retroactivity—all other issues will be barred by reason of res judicata. See, *e.g.*, *Misani* v. *Ortho Pharmaceutical Corp.*, 44 N.J. 552, 555, 210 A. 2d 609, 610 (1965), *appeal dismissed*, 382 U.S. 203 (1965), and authorities cited in section 3, *infra*. And the single issue of retroactivity has been held by this Court to be a State question, not a matter of Federal constitutional law. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-65 (1932); *cf. Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 958 (1949).

3. *The traditional rule*: The instant appeal would pass muster even under the more restrictive traditional rule. As the authorities cited earlier demonstrate, that rule would not mechanically prohibit review merely because further proceedings were ordered by the courts below. See, *e.g.*, *Radio Station WOW, Inc.* v. *Johnson*, *supra* (326 U.S. at 123-27), a decision handed down the same year that *Market Street R. Co.* was determined.

Nor, in our view, would the traditional rule defeat jurisdiction where, as here, there is in fact a final judgment on the merits—the "final word of a final court"—and the only open question is whether that judgment should be fully or just partially retroactive. *Cf. Radio Station WOW, Inc.* v. *Johnson, supra; United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). Indeed, this appeal is limited to that part of the judgment of the New Jersey Supreme Court which affirms on the merits, *Appendix A to First Mercantile's Jurisdictional Statement*, a limitation which is permitted by Rule 10(2) of this Court's Rules. *Cf. Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co.* v. *United Eng. & F. Co.*, 351 U.S. 445 (1956).

This is not a case like *Gospel Army* v. *Los Angeles*, 331 U.S. 543 (1947), relied upon by appellees. There,

under California law, the California Supreme Court's reversal of a lower court's decision effectuated a remand of the case for a new trial and placed the parties "in the same position as if the case had never been tried." *Id.*, at 546.

By contrast, in the instant case, as in *Johnson* v. *Muelberger*, 340 U.S. 581, 583 (1951), the Federal constitutional questions, determined below and appealed here, are "no longer open as an issue upon return of these proceedings" to the lower State courts. The reason is that the determination of these questions, under well-established New Jersey precedents, is binding on the parties; it is the law of the case and cannot be disturbed.*

In short, the traditional view would regard the judgment entered below as final and the possibility of partial post-judgment relief as extraneous.

4. *The separate issue exception*: In *Radio Station WOW, Inc.* v. *Johnson, supra* (326 U.S. at 126), this Court reviewed a judgment which ordered rescission of a radio station lease and an accounting. "In effect, such a controversy is a multiple litigation allowing review of the

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* See, *e.g.*, *Sarson* v. *Mueller*, 105 N.J.L. 212, 213, 143 A. 428 (E.&A. 1928); *U.S. Pipe, etc.* v. *United Steelworkers of America*, 37 N.J. 343, 351-52, 181 A. 2d 353, 357 (1962); *Misani* v. *Ortho Pharmaceutical Corp.*, 44 N.J. 552, 555, 210 A. 2d 609, 610 (1965), *appeal dismissed*, 382 U.S. 203 (1965); *Deverman* v. *Stevens Builders*, 35 N.J. Super. 300, 302, 114 A. 2d 15, 16 (App. Div. 1955); *Ehnes* v. *King*, 50 N.J. Super. 109, 113, 141 A. 2d 62, 64 (App. Div. 1958); *Lathrop* v. *Lathrop*, 57 N.J. Super. 532, 541, 155 A. 2d 106, 110 (App. Div. 1959). If appellees will relinquish their rights under these decisions, appellant would be happy to litigate the constitutional issues at a plenary hearing and develop the record which appellees say is incomplete.

adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Id.*

Gradually, this exception was enlarged and the traditional finality rule was relaxed. Stern & Gressman, *Supreme Court Practice* §3.11, pp. 96-99 (4th ed. 1969).* "The Court is now more concerned with the practical importance of a prompt decision by it of the federal question decided by the state court, and less with whether the judgment is final in the strict procedural sense." *Id.* at 99; *compare Republic Natural Gas Co.* v. *Oklahoma, supra* (334 U.S. 62), a 1948 5-4 decision upon which appellees rely, *with Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), which cuts the other way. Formal severability of the issues under appeal is no longer a rigid requirement. See *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 153).

The separate issue exception has been widely used. As indicated, a rescission order was held separate and therefore reviewable, although the order also required an accounting and the accounting was yet to take place. *Radio Station WOW, Inc.* v. *Johnson, supra.* A full faith and credit issue was extracted from an estate contest, *Johnson* v. *Muelberger, supra* (340 U.S. at 583), and a remand for redetermination of a criminal defendant's sentence did not preclude review of whether the remand should also have comprehended the question of guilt. *Brady* v. *Maryland, supra* (373 U.S. at 85, n. 1). Appeals were allowed from the dismissal of two out of four counts in a complaint, *Sears, Roebuck & Co.* v. *Mackey, supra* (351 U.S. 427), and from the adjudica-

* This is admitted by appellees. NJAGb8; *Joint Motion,* p. 10.

tion of a claim, but not of a related counterclaim. *Cold Metal Process Co.* v. *United Eng. & F. Co., supra* (351 U.S. 445).

Interlocutory questions were held separate and appealable in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (posting of security for costs), in *Local No. 438* v. *Curry*, 371 U.S. 542, 548-50 (1963) (jurisdiction), in *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963) (venue), and in *Rosenblatt* v. *American Cyanamid Company, supra* (15 L. Ed. 2d at 42-43) (jurisdiction).* If these interlocutory questions, determined well in advance of a trial on the merits, were "final judgments" for purposes of appeal, surely a final judgment on the merits is reviewable, despite the existence of an open issue as to the retroactive impact of that judgment.

Three other decisions in this area should be emphasized. In *Brown Shoe Co.* v. *United States, supra* (370 U.S. 294), a merger was held to violate the Clayton Act, but the trial court reserved its ruling on the complex question of implementing divestiture. This Court, taking a "pragmatic approach" to finality (370 U.S. at 306), ruled that there was jurisdiction to review the adjudication on the merits.

The instant case is easier: the implementation of the judgment below involves far less complexity than the divestiture problem in *Brown Shoe*. Moreover, in *Brown Shoe*, the danger of piecemeal appeals was substantial. As Justice Harlan said in dissent: "a second appearance of this case on our docket is not an imaginative possi-

* See also *Suess* v. *Stapp*, 407 F. 2d 662, 663 (7 Cir. 1969) (lis pendens cancelled).

bility but a reasonable likelihood" (370 U.S. at 362).* Here, however, that danger does not exist; as demonstrated in paragraph 2, *supra*, the only remaining issue is a State question, not reviewable by this Court.

A second precedent to consider is this Court's unanimous decision in *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964). The case arose in an Iowa court. A labor union sued to compel arbitration. The employer's defense was that the obligation to arbitrate was terminated because the union had breached a no-strike clause. For the same breach, the employer counterclaimed for damages.

Pursuant to Iowa procedure, the employer moved before trial for an order denying the union's claim. The Iowa trial court granted the motion and the Iowa Supreme Court affirmed. Justice Harlan, speaking for the Court, found that "our jurisdiction was properly invoked" because the Iowa order, although "deemed interlocutory for purposes of appeal" under Iowa procedural rules, nevertheless is a "final order . . . adjudicating the point so determined, *which shall not be questioned on the trial of any part of the case of which it does not dispose*," according to the same rules. *Id.* at 249, n. 2 (emphasis added).

Quite obviously, the case at bar is in the same posture: as demonstrated earlier, the judgment of the New Jersey Supreme Court on the merits—on the Federal constitutional issues—is the law of the case and cannot be disturbed. And in New Jersey, unlike Iowa, there is not

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* "For if the terms of the divestiture are indeed so difficult to formulate and so interrelated with market conditions, it is most unlikely that the decree to be issued by the District Court will turn out to be satisfactory to both parties." *Id.*

even the hurdle of a procedural rule which deems the order "interlocutory for purposes of appeal."

A third precedent requires attention. In *Hudson Distributors* v. *Lilly & Co., supra* (377 U.S. 386), an 8 to 1 decision, with Justice Harlan dissenting, a drug retailer sued two manufacturers of trademarked pharmaceuticals in the Ohio courts. The relief requested was invalidation of the Ohio Fair Trade Act under Ohio and Federal law. There was a counterclaim seeking enforcement of the Act against the plaintiff.

The trial court invalidated the Act, but the intermediate appellate court reversed and remanded for trial of the counterclaim. The Ohio Supreme Court affirmed. In answer to the counterclaim, the plaintiff raised factual defenses, as well as defenses arising under Ohio law and Federal antitrust legislation. Nevertheless, this Court accepted jurisdiction, holding:

> *"The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein on the cross-petition does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable within the meaning of 28 USC §1257."* *Id.* at 389, n. 4; emphasis added.

Appellees are utterly wrong in attempting to distinguish *Hudson Distributors* on the ground that the issue there appealed was "capable of finally determining the litigation between the parties" (*Joint Motion*, p. 11). In fact, the very basis of Justice Harlan's dissent was that the litigation "is still in its early stages" and involved unresolved Federal questions with the result that "there is every likelihood that the cases will be brought back to this Court for a second time, for consideration of

the questions now unresolved." *Id.* at 399. By contrast, the instant appeal will not return to this Court if the Federal constitutional questions presented here are adjudicated at this time.*

To conclude, it is perfectly clear that a final judgment on the merits has been rendered below; and that the minor question of partial post-judgment relief, no matter how it is resolved, will not affect the final judgment.** In such circumstances, more so than in many of the cases cited above, jurisdiction should not be declined for lack of finality. The separate issue exception applies.

5. *The serious public consequences exception:* Where intermediate rulings "may carry serious public consequences," *Radio Station WOW, Inc.* v. *Johnson, supra* (326 U.S. at 124), where there is "a threat of serious erosion of national policy," *Rosenblatt* v. *American Cyanamid Company, supra* (15 L. Ed. 2d at 42), where there are "compelling public considerations," Harlan, J., dissenting in *Hudson Distributors* v. *Lilly & Co., supra* (377 U.S. at 400), this Court will relax the finality doctrine and accept jurisdiction.

No intermediate ruling is involved in the case at bar, as we have demonstrated above. Nevertheless, it is worth noting that serious public consequences will flow from a rejection of this appeal.

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* The point is covered in section 2, *supra*.

** It has been noted that "Piecemeal review, against which the rule of finality is aimed, is not as decisive a consideration after judgment as before judgment." *Joseph F. Hughes & Co.* v. *United Plumbing & Heating, Inc.*, 390 F. 2d 629, 630 (6 Cir. 1968); see *Plymouth Mut. L. Ins. Co.* v. *Illinois Mid-Continent L. Ins. Co.*, 378 F. 2d 389, 391 (3 Cir. 1967).

Important national policies will be eroded. Interstate commerce has been stopped at the borders of New Jersey and will remain that way unless this Court acts. The courts of New Jersey have peremptorily refused to recognize Pennsylvania's power to license and regulate Pennsylvania loans and lenders; these courts will not extend full faith and credit to Pennsylvania legislation unless this Court reverses the judgment below. And the denial of due process of law, which has already occurred, will persist absent intervention now. *Cf. Rosenblatt,* 15 L. Ed. 2d at 42.

Moreover, this case is not merely a dispute between private litigants. The State of New Jersey argues for appellees and the Commonwealth of Pennsylvania, to protect its "vital interests" (*Amicus brief,* p. 2), has joined with appellants. This interstate "discord" is "at war with the considerations of comity" and could well give rise to reciprocal retaliation. *Oxford Consumer Discount Co.* v. *Stefanelli,* 55 N.J. 489, 500, 262 A. 2d 874, 880 (1970) (Weintraub, C.J., dissenting); see *Forgan* v. *Bainbridge,* 34 Ariz. 408, 274 Pac. 155, 158 (1928); Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 *N.Y.U.L. Rev.* 267, 286-87 (1966).

6. *The exception for rulings which are "fundamental to the further conduct of the case":* As early as 1945, this Court relaxed the finality requirement where the ruling under appeal was "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945).* Subsequent decisions were to the same effect. *Land* v. *Dollar,* 330 U.S. 731, 734 at n. 2 (1947); *Larson* v. *Domestic and Foreign Commerce*

* The question there involved what items of damage were properly provable in a condemnation action.

Corp., 337 U.S. 682, 685 at n. 3 (1949); *Brady* v. *Maryland, supra* (373 U.S. at 85, n. 1); *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 153-54).

Doubtless, the reason underlying this exception is to avoid "a totally unnecessary trial," *Rosenblatt* v. *American Cyanamid Company, supra* (15 L. Ed. 2d at 42), to avoid subjecting the litigants "to long and complex litigation which may all be for naught. . . ." *Mercantile Nat. Bank* v. *Langdeau, supra* (371 U.S. at 558). Appellees apparently accept this reasoning. (*Joint Motion*, p. 10).

Clearly, resolution of the Federal constitutional issues presented here is "fundamental to the further conduct of the case" and may avoid "a totally unnecessary trial." What remains to be determined below is the extent to which the judgment of the New Jersey Supreme Court should be applied retroactively. Appellants contend the judgment is erroneous. If appellants are correct, it would be "unnecessary", indeed meaningless, to try the remanded issue because the judgment could not be applied retroactively, prospectively, or at all. The proceeding on remand would "all be for naught."

7. *Serious prejudice to the parties:* This Court has also relaxed the finality rule to avoid serious prejudice to the parties. See *Local No. 438* v. *Curry, supra* (371 U.S. at 550); *Brady* v. *Maryland, supra* (373 U.S. at 85, n. 1); *Hudson Distributors* v. *Lilly & Co., supra* (377 U.S. at 400-01) (Harlan, J., dissenting); *Gillespie* v. *United States Steel Corp., supra* (379 U.S. at 153). Here, the delay appellees seek will seriously prejudice appellant in several ways:

First, as in *Gillespie* v. *United States Steel Corporation,* "the eventual costs . . . will certainly be less if we now pass on the questions presented here rather than

send the case back with those issues undecided" (379 U.S. at 153). The reason is that, as demonstrated in section 6, *supra*, a trial on the issue of retroactivity may be unnecessary.

Second, as appellees suggest (*Joint Motion*, pp. 7-8), appellant has not made secured loans to New Jersey borrowers who have sought funds in Pennsylvania since September 11, 1968. That was the day New Jersey's Appellate Division held that such loans—both principal and interest—would be forfeited, although legitimately transacted in Pennsylvania. To do otherwise would have placed appellant at the mercy of any borrower who wished to stop repaying his loan. Thus, there has already been irreparable injury: appellant will never make up the business it has lost. Further delay in ruling on the constitutional issues will substantially increase the injury to appellant as well as to other Pennsylvania lenders.

Third, appellant lends to high risk borrowers. Many have stopped repaying their loans. Because of the decision below, enforcement of such loans is questionable and would involve lengthy litigation. The longer this proceeding is delayed, the less likely it is that these unpaid loans will be recoverable, no matter what the ultimate legal result turns out to be.

* * *

There is a final judgment here. Jurisdiction should not be declined or delayed.

POINT II

There are substantial questions here.

A. The Commerce Clause.

Appellees chiefly rely on *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (Dist. Ct. App. 1964), appeal dismissed *sub nom. Fairfax Family Fund* v. *California*, 382 U.S. 1 (1965). There, the California court held that California's *Small Loan Law* required the licensing of a Kentucky mail order lending corporation which had important localized California activities. This Court dismissed the subsequent appeal for want of a substantial Federal question. Justice Douglas, viewing the facts differently, dissented on the ground that the case involved licensing of a firm "doing an exclusively interstate business" (382 U.S. 1).

But *Fairfax* is plainly distinguishable, as Chief Justice Weintraub pointed out in the dissent filed below, "with respect to both the facts and the issue involved." *Oxford Consumer Discount Co.* v. *Stefanelli*, 55 N.J. 489, 495 at n. 1, 262 A. 2d 874, 878 at n. 1 (1970). "There a Kentucky corporation solicited loans in California by mail and completed the loan transaction by mail after having a credit check made locally in California . . . ." *Id.* There the borrowers never left California and the California court found "no doubt that negotiation for the respective loans takes place within the state . . . ." (235 Cal. App. 2d at 885).

No such substantial contacts exist here. It is undisputed that the borrowers went to Pennsylvania to borrow money; that the loan was made there; and that the lender was a licensed Pennsylvania corporation. There are alle-

gations of solicitation in New Jersey, but no trial was held, no such allegation was proved, and the decision went off on other factors, namely, (a) residence of the borrower and (b) situs of the mortgage.*

Of course, the "issue involved" in *Fairfax* was also different from that presented in the instant appeal; there "the question was not whether the loans should be forfeited but whether the lender should be restrained from continuing the business until a license was obtained." *Oxford,* 55 N.J. at 495, n. 1, 262 A. 2d 878, n. 1 (Weintraub, C.J., dissenting). It is true, as appellees argue, that the California statute involves regulation as well as licensing (*Joint Motion,* p. 14). But despite appellees' citation of more than a dozen sections of the California *Small Loan Law* (*Id.*), they somehow omit any reference to §24458 which permits enforcement in California of small loans "lawfully made outside the state" with respect to principal, interest and charges to the extent allowable in California (10% interest plus substantial charges, §§24451-55).** There is no analogue in New Jersey's statute; loans

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* It should be noted that this case involves a suit on the loan, not on the mortgage; that the mortgage was discharged during the course of litigation; and that the issue is not whether mortgages can be regulated, but whether loans can be forfeited. While full argument must await plenary briefs, it is worth stating that there is substantial authority for the proposition that mortgages are to be regarded as incidental to loans and not as significant contacts for conflicts purposes. See *e.g., Restatement Second, Conflict of Laws* §195, *Comment* a; *Manhattan Life Ins. Co.* v. *Johnson,* 188 N.Y. 108, 111, 80 N.E. 658, 659 (1907); see also Chief Justice Weintraub's dissenting opinion below at 55 N.J. 496-98, 262 A. 2d 878-79.

** Larger loans made outside California are treated similarly. *California Financial Code* §22459.

"lawfully made outside the state" are rendered wholly unenforceable in New Jersey under the judgment entered below.

Finally, in *Fairfax* there was no question of competing regulatory schemes. These were California loans and only California could regulate them. Kentucky did not appear before this Court and assert its interest in the transactions. In marked contrast, the case at bar does involve competing, albeit comparable regulatory provisions. *Oxford*, 102 N.J. Super. at 559, 246 A. 2d at 465 (App. Div. 1968). And Pennsylvania has filed an *amicus* brief which states (at p. 2) that "its vital interests will be adversely affected if the decision of the New Jersey Supreme Court is not reversed . . . ."

All that remains of appellees' argument is a series of bald allegations lacking any basis in the record. Thus, there is no proof, and appellant denies, that licensed Pennsylvania lenders are engaged in "victimization" of New Jersey borrowers or in "maneuvering" to avoid New Jersey supervision (NJAGb19). There is no proof, and appellant denies, the beaming of advertising to New Jersey; the participation in referral schemes; and the use of agents to solicit business (NJAGb20).*

New Jersey's Attorney General concedes: "There is no doubt that to the extent New Jersey would apply the 1965 Act to the activities of appellants *there is a 'burden'*

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*Moreover, appellant questions whether such solicitation of interstate business, even if it existed, would render interstate or Pennsylvania loans subject to New Jersey regulation. See, *e.g.*, *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U.S. 276, 278-79 (1961); *Furst* v. *Brewster*, 282 U.S. 493, 497-98 (1931).

placed upon their interstate activities involving transactions with New Jersey residents." (NJAGb15; emphasis added). We contend that burden is substantial and undue. It is unconstitutional.

B. Due Process.

Can one State regulate transactions which are legitimately negotiated and concluded in a neighboring State and are licensed and regulated by that neighboring State? That is the essence of the due process issue which this Court should resolve.

Appellees do not meet this issue. In the Joint Motion (pp. 15-16), appellees cite inapposite insurance precedents from the 1940's and omit *State Board of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), a more recent decision, and *Alaska Packers Ass'n* v. *Industrial Accident Comm.*, 294 U.S. 532, 540-41 (1935), which is right in point. And in the brief submitted by New Jersey's Attorney General (pp. 22-23), there is the peculiar notion that Pennsylvania's courts and Attorney General will simply defer to the State of New Jersey with respect to regulation of Pennsylvania loans and Pennsylvania lenders.*

New Jersey's Attorney General also relies on a bill which revises the Secondary Mortgage Loan Act (NJAGb 23-24). It has yet to be signed by the Governor; hence, it

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* In an interesting article on loan sharks, published in the May-June 1970 issue of the *Harvard Business Review*, there is this observation: "How does one assign a dollar cost to the role of loan sharking in maintaining large-scale criminal organizations that corrupt or undermine government, *as appears to be the case in New Jersey?*" Seidl, *"Let's Compete with Loan Sharks*, 48 *Harv. Bus. Rev.* #3, pp. 69, 73 (May-June, 1970) (emphasis added).

is hardly probative of anything. In any event, it surely does not avoid the due process question. Indeed, it codifies what the courts below decided: the requirement that out-of-state lenders maintain a New Jersey office (§12(a), NJAG10a) and the regulation of out-of-state transactions, notwithstanding the lack of substantial local contacts (§24(c), NJAG24a).

We have no difficulty with a State's regulation of out-of-state loans where the situs has been "maneuvered" in bad faith—the evil which troubles New Jersey's Attorney General (NJAGb24). See, *e.g.*, *Seeman* v. *Philadelphia Warehouse Co.*, 274 U.S. 403, 408-09 (1927). For example, the California *Small Loan Law* which was sustained in *Fairfax* had an appropriate provision: "Any person who contracts for or negotiates *in this State* a loan to be made outside the State *for the purpose of evading or avoiding this division* is subject to the provisions of this division." *California Financial Code* §24460 (emphasis added).

But New Jersey goes much further. It would regulate loans legitimately made in Pennsylvania. It would supersede Pennsylvania's regulatory provisions. This, in our view, is unconstitutional.

C. Full Faith and Credit.

This issue turns on whether Pennsylvania's *Consumer Discount Company Act* is so offensive to New Jersey public policy as to warrant an exception to the constitutional policy of requiring States to give full faith and credit to the statutes and judgments of sister States. We submit that appellees have proven no such overriding New Jersey interest here. The evidence is to the contrary.

First, New Jersey's Appellate Division itself found that: "Supervision of [Pennsylvania] licensees is com-

prehensive and comparable to that provided for by the New Jersey act." *Oxford Consumer Discount Co.* v. *Stefanelli; supra* (102 N.J. Super. at 559, 246 A. 2d at 465). The New Jersey Attorney General's attack on Pennsylvania's enforcement of its statutes (NJAGb20) is at variance with what the Appellate Division held and, more significantly, is utterly without basis in the record. We, and doubtless the Commonwealth of Pennsylvania (*Amicus brief*, pp. 9-10, 14-15), are willing to try the question whether New Jersey or Pennsylvania has more effective enforcement of loan regulations.

Second, as to the comparative costs to the borrower, we would strongly suggest that Pennsylvania's system of 17%-18% interest and insubstantial charges is far more beneficial to high risk borrowers who are covered by these statutes than New Jersey's 14% limit with substantial charges. Indeed, this proposition is patently evident in the revision of New Jersey's Secondary Mortgage Loan Act, now awaiting the Governor's signature, a revision which generally adopts the Pennsylvania view. As the Statement accompanying the revision notes, the combined impact of New Jersey interest and allowable charges may be equivalent to an effective rate of 50% or more to the borrower, far in excess of what Pennsylvania permits.*

Third, the Pennsylvania act is more protective than New Jersey's in other respects, *Oxford*, 55 N.J. at 496-97, 262 A. 2d 878-79 (Weintraub, C.J., dissenting), as can be demonstrated in a plenary brief.

Fourth, we submit that protection of New Jersey borrowers from the shocking demands of loan sharks on *both* banks of the Delaware is not fostered by destroying

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*The Statement is set forth in the Supplemental Appendix to Oxford's Reply Brief, pp. 1a-3a.

licensed, regulated Pennsylvania lenders. The availability of legal loans in Pennsylvania is an excellent method of driving the loan shark out of business. See Seidl, *Let's Compete with Loan Sharks*, 48 *Harv. Bus. Rev.* #3, p. 69 (May-June, 1970); Felsenfeld, *Consumer Interest Rates*, 23 *Business Lawyer* 931 (1968); *cf. Editorial*, 93 *New Jersey Law Journal* 500 (July 9, 1970), wherein the writer recommends that New Jersey "permit individuals to borrow at competitive market costs from private sources" and that the Legislature remove "unreasonable restraints which presently deny its [New Jersey] citizens effective access to borrowable funds at reasonable interest rates."

CONCLUSION

For the reasons given above and in our Jurisdictional Statement, we urge that probable jurisdiction be noted and that appellees' motion to dismiss this appeal be denied.

Respectfully submitted,

ARNOLD K. MYTELKA,
ROGER S. CLAPP,
Counsel for Appellant First Mercantile Consumer Discount Company,
744 Broad Street
Newark, New Jersey 07102

Of Counsel:

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Newark, New Jersey 07102

SUPPLEMENTAL APPENDIX

Order of Superior Court of New Jersey, Law Division—Essex County

This matter being brought before the court upon application of Cummis, Kent & Radin, Esqs., attorneys for plaintiff Oxford Consumer Discount Company of North Philadelphia, and it appearing that both said plaintiff and Intervenor First Mercantile Consumer Discount Company have served upon all parties hereto their respective Notices of Appeal to the Supreme Court of the United States from the judgment in this case of the Supreme Court of the State of New Jersey entered on March 17, 1970, and it further appearing that Intervenor Attorney General of the State of New Jersey has notified the court in writing that he does not desire to participate in the trial of this matter, and the consent of the remaining parties in this action having been obtained; it on this 28th day of April, 1970

ORDERED, that the pre-trial conference in this action, originally scheduled for May 1, 1970, be and is herewith adjourned without date pending final disposition of the aforementioned appeals by the Supreme Court of the United States, and it is further

ORDERED, that the pre-trial conference and any other matter in this action may thereafter be heard by this court upon 30 days' notice filed by ane one or more parties to this action.

The consent to the form and entry of this Order by counsel for defendants Anthony E. Stefanelli and Theresa

Order of Superior Court of New Jersey,
Law Division—Essex County

A. Stefanelli as set forth below in no way constitutes a waiver of her right to object to the participation in the pre-trial conference and trial of this matter by any party other than plaintiff Oxford Consumer Discount Company of North Philadelphia.

/s/ WILLIAM J. CAMARATA,
J.S.C.

We herewith consent to the form and entry of this Order.

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Attorneys for Plaintiff
Oxford Consumer Discount
Company of North Philadelphia
By: /s/ MICHAEL B. TISCHMAN

ANNAMAY T. SHEPPARD
NEWARK LEGAL SERVICES PROJECT
Attorneys for Defendants
Anthony E. Stefanelli and
Theresa A. Stefanelli
By: /s/ ANNAMAY T. SHEPPARD

CLAPP & EISENBERG
Attorney for Intervenor
First Mercantile Consumer Discount Company
By: /s/ ARNOLD K. MYTELKA

KIRSTEN, SOLOMON & FRIEDMAN
Attorneys for Intervenors
Paul V. Durkin and Ellen Durkin
By: /s/ JACK B. KIRSTEN

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 30 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 256

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,
Petitioner,

v.

ANTHONY E. STEFANELLI, *et al.*,
Respondents,

and

PAUL V. DURKIN, *et al.*,
Respondents,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR REHEARING AND APPENDIX OF FIRST MERCANTILE CONSUMER DISCOUNT COMPANY

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and

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Respondents,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR REHEARING

This petition, presented on behalf of appellant First Mercantile Consumer Discount Company, respectfully seeks a determination by this Court as to whether the

Court's prior Order dismissing this appeal constitutes (1) a dismissal on the merits (*i.e.*, for want of a substantial federal question as in *Gorun* v. *Montana*, 399 U. S. 901 (1970)), or (2) a procedural dismissal for want of a final judgment (as in *Laikind* v. *Attorney General*, 397 U. S. 148 (1970)), a ground asserted by appellees. For reasons set forth below, this clarification is crucial to the proper and efficient disposition of further State court proceedings which are about to commence.* Petitioner seeks this clarification as a matter of fundamental justice.

The instant appeal sought review of the decision of the New Jersey Supreme Court, by vote of 4 to 3, sustaining the validity of the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1, *et seq.*, against the contention that it violates the Commerce Clause, the Full Faith and Credit Clause and the Due Process Clause of the *United States Constitution*. *Oxford Consumer Discount Co.* v. *Stefanelli*, 55 N. J. 489, 262 A. 2d 874 (1970). The case involves a serious confrontation between the States of New Jersey and Pennsylvania, so much so that the Attorney General of New Jersey intervened on behalf of appellees and the Attorney General of Pennsylvania filed an *amicus* brief in support of appellant's position.

Although the New Jersey Supreme Court entered final judgment on the merits of this controversy, definitively resolving the constitutional issues, it left open for further litigation the extent to which its judgment should be applied retroactively. 55 N. J. at 491-94, 262 A. 2d at 875-77. On this basis, appellees argued at length that this appeal should be dismissed for want of a final judgment.

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* Efforts to resolve this question administratively were unsuccessful. See Affidavit of Roger S. Clapp, set forth in the Appendix attached hereto.

See Point I of New Jersey Attorney General's Motion to Dismiss (pp. 8-14) and Point I of the Joint Motion to Dismiss filed by the other appellees (pp. 6-12). Thus, because there has never been a plenary factual adjudication (the case arose on cross-motions for summary judgment), New Jersey's Attorney General argued (at p. 14 of his Motion to Dismiss):

> ". . . there still exists a disturbing aura of incompleteness stemming from the utter absence of a fully tried record detailing, with exactitude, the circumstances surrounding any particular second mortgage loan transaction . . . The present posture of the litigation clearly does not permit enlightened consideration and, in view of the remand and what will follow at the trial level as a result, there has not yet been the 'final adjudication' which 28 U.S.C. §1257 contemplates."*

In these circumstances, this Court, contrary to its regular practice, entered the following Order on October 12, 1970:

> "The appeals are dismissed. Mr. Justice Black and Mr. Justice Stewart are of the opinion that probable jurisdiction should be noted."

After exhausting administrative approaches (Affidavit of Roger S. Clapp, appended hereto), this petition for rehearing was prepared. Its primary purpose is to urge this Court to amend its prior Order so as to specify whether the dismissal of the appeal herein is procedural

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* Our analysis of the Final Judgment Rule reached the opposite conclusion. See Reply Brief of Appellant First Mercantile Consumer Discount Company, pp. 2-17.

(for lack of final judgment) or on the merits. *Cf. Parks v. Simpson Timber Co.*, 389 U. S. 909 (1967); *Slochower v. Board of Higher Education*, 351 U. S. 944 (1956); *Union Trust Co. v. Eastern Air Lines*, 350 U. S. 962 (1956); *Securities & Exchange Commission v. Drexel & Co.*, 349 U. S. 910 (1955). The reasons for this plea are:

1. If the dismissal of this appeal was predicated upon the absence of a "final judgment," 28 *U.S.C.* §1257, and if this Court has accepted the argument of New Jersey's Attorney General that a factual record should be made prior to consideration of the constitutional questions, then the litigants and the courts below should be aware of this determination. Otherwise, the courts below may reject the offer of evidence respecting the constitutional issues on the premise that this Court's dismissal was on the merits.

2. Beyond the dilemma described above, the parties hereto and the courts below will be faced with a further problem. Respondents (appellees) Paul V. Durkin, *et al.*, have asserted a class action against petitioner (appellant) First Mercantile. The propriety of this class action is now pending before the Appellate Division of New Jersey's Superior Court. Whether the Federal constitutional questions posed in the instant appeal are still open, or have been laid to rest, will have substantial bearing on the resolution of the class action issue.

3. If this Court's dismissal of the instant appeal was procedural only—a matter of ripeness—petitioner First Mercantile will file a new Jurisdictional Statement upon the termination of the litigation below; it will be required (by business exigencies) to do so no matter how the State courts deal with the question of retroactivity. It would seem unfair to put this party to the expense of a further

appeal if, in fact, the dismissal of the instant appeal was on the merits and hence *res judicata*.

4. If this Court's dismissal was on the merits, the ramifications beyond the parties hereto will be serious and widespread. There will be a substantial and adverse impact on Pennsylvania businesses, as is indicated in the *amicus* brief filed by Pennsylvania's Attorney General. If that is not what was meant by the Order that "The appeals are dismissed," then clarification would surely be in the interests of justice and fair play.

Petitioner respectfully advances one additional point. If the dismissal was on the merits, petitioner requests reconsideration, not only because of the seriousness of this matter to petitioner's business, which may be substantially destroyed, but because the entire philosophy underlying this Court's interpretation of the Commerce Clause should not be uprooted without plenary consideration and a full opinion. In this connection, the case at bar goes much further than *Fairfax Family Fund v. California*, 382 U. S. 1 (1965), where Mr. Justice Douglas, dissenting from the Court's dismissal for want of a substantial federal question, pointed out that the Court was departing from established Commerce Clause precedents.

If new law is to be made here, petitioner urges that it not be made without full scale briefs and oral argument; that it not be made with the single sentence, "The appeals are dismissed."

CONCLUSION

For the reasons set forth above and in petitioner's Jurisdictional Statement and Reply Brief, petitioner prays that this petition for rehearing be granted.

Respectfully submitted,

ARNOLD K. MYTELKA,
ROGER S. CLAPP,
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Newark, New Jersey 07102

Of Counsel:

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Newark, New Jersey 07102

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

ARNOLD K. MYTELKA,
Counsel for Petitioner.

APPENDIX

Affidavit of Roger S. Clapp.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

ROGER S. CLAPP, being duly sworn according to law upon his oath, deposes and says:

1. I am an Attorney at Law of the State of New Jersey, a member of the firm of Clapp & Eisenberg and a member of the Bar of the Supreme Court of the United States.

2. As counsel for First Mercantile Consumer Discount Company in this appeal, I received a letter from the Clerk of the United States Supreme Court dated October 12, 1970, a copy of which is annexed hereto.

3. Said letter sets forth the Order of the United States Supreme Court dismissing this and a related appeal, but the Order does not indicate whether the dismissals were ordered for want of a substantial federal question or because the judgment below was not final.

4. In an effort to ascertain the basis for the Order I telephoned Mr. Edmund P. Cullinan and Mr. Michael Rodak, Jr. of the United States Supreme Court Clerk's Office on October 15, 1970. Both verified that the language of the Order as set forth in the letter to me dated October 12, 1970 attached hereto is correct, and they advised that there was nothing that they could do to determine

the basis for the Court's Order. They suggested that a Petition for Rehearing was the appropriate method to determine the basis for the Order.

/s/ ROGER S. CLAPP
Roger S. Clapp

Sworn and subscribed to
before me this 27th day
of October, 1970.

/s/ ANNA M. WASS
Anna M. Wass
Notary Public of New Jersey
My Commission Expires Aug. 20, 1974

Order of Dismissal

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

October 12, 1970

E. ROBERT SEAVER
Clerk of the Court

ROGER S. CLAPP, ESQ.
CLAPP & EISENBERG
744 Broad St.
Newark, N. J. 07102

Re: *First Mercantile Consumer Discount Co.* v. *Stefanelli, et al.*, No. 256; *Oxford Consumer Discount Co. of North Phila.* v. *Stefanelli, et al.*, No. 257, Oct. Term, 1970

Dear Sir:

The Court today entered the following order in the above-entitled cases

The appeals are dismissed. Mr. Justice Black and Mr. Justice Stewart are of the opinion that probable jurisdiction should be noted.

Very truly yours,

E. ROBERT SEAVER,
Clerk
By
Assistant Clerk

Order of Dismissal

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Office of the Atty. Gen. of Pa.
State Capitol
Harrisburg, Pa. 17120

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